TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 520

JOHN D. BINGAMAN, AS COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO, ET AL., APPELLANTS,

vs.

GOLDEN EAGLE WESTERN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

FILED OCTOBER 16, 1935.

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IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW MEXICO

Be it remembered that on the 25th day of May, 1935, there was filed in the office of the Clerk of the District Court of the United States for the District of New Mexico, in cause number 2765 Equity on the Civil Docket of said Court, wherein Golden Eagle Western Lines, Inc., a corporation, is plaintiff, and James J. Connelly, as Commissioner of Revenue of the State of New Mexico; Juan N. Vigil, as State Comptroller of the State of New Mexico; Frank H. Patton, as Attorney General of the State of New Mexico; Juanita Hill, as State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley as Governor of the State of New Mexico, are defendants, a Bill of Complaint, in words and figures as follows, towit:

BILL OF COMPLAINT—Filed May 25, 1935

To the Honorable District Court of the United States for the District of New Mexico:

Golden Eagle Western Lines, Inc., a corporation of the city of Los Angeles, State of California, files its bill of complaint against the above named defendants and does complain and allege:

I

That the plaintiff, Golden Eagle Western Lines, Inc., is now and at all the times herein mentioned since its organization on or about the 26th day of January, 1935, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, having for its principal place of business the city of Los Angeles, County of Los Angeles, State of California, and is not a citizen or resident of the State of New Mexico, and that its officers, agents and employees are citizens of the United States.

[fol. 4]

II

That at all times herein mentioned, the defendant James J. Connelly is the Commissioner of Revenue of the State of New Mexico; the defendant Juan N. Vigil is the State

Comptroller of the State of New Mexico; the defendant Frank H. Patton is the Attorney General of the State of New Mexico, the defendant Juanita Hill is the State Gasoline Tax Collector of the State of New Mexico, and the defendant Clyde Tingley is the Governor of the State of New Mexico.

III

That each of said defendants named herein is a citizen and resident of the State of New Mexico and of the federal judicial district of New Mexico.

IV

That this suit is a civil suit in equity and the matter in controversy herein exceeds, exclusive of interests and costs, the sum of three thousand dollars as hereinafter more fully appears and arises under the Constitution of the United States, and is between citizens of different states.

V

That during all the times herein mentioned there has been and now is existing in the State of New Mexico a statute of said State known as Chapter 176, Session Laws of 1933, reference to which statute is hereby made and by such reference incorporated herein. It is provided in said statute that violation thereof shall be subject to punishment by a fine of not less than Five Hundred Dollars ($500.00) nor more than One Thousand Dollars ($1,000.00), or imprisonment in the County Jail for a term of not less than thirty days, nor more than one year, or by both such fine and imprisonment and that each day or part thereof during which any person shall engage in the business as a "distributor" without being the holder of an uncancelled license, shall constitute a separate offense within the meaning of [fol. 5] said act. By said act, the word "distributor" is defined so as to include any corporation consuming or using in the State of New Mexico any motor fuel imported into said State from any other state, who shall have purchased or otherwise acquired the same before it shall have been received by any other person in said State. By said statute an excise tax of five cents (5¢) per gallon is levied and imposed upon the use of all gasoline so imported and used in said State. By such statute it is also made unlawful, and

subject to the punishment above stated, for any corporation to use any motor fuel in the State of New Mexico unless such corporation (being a "distributor" as aforesaid) is the holder of an uncancelled license issued by the State Comptroller of said State secured through application and procedure provided by such statute. The said statute further provides that, as a part of the procedure for the securing of said license, the applicant, if a corporation, shall file with its application a certified copy of the certificate of license issued by the New Mexico Corporation Commission, showing that such corporation is authorized to transact such business in said State, and shall also file with said State Comptroller a bond in a sum approved by said Comptroller, and with a surety company authorized by the New Mexico Corporation Commission to transact business in said State as surety, and upon which such "distributor" shall be the principal obligor and the State of New Mexico shall be the obligee, conditioned upon the prompt filing of true reports and payment by such "distributor" to said Comptroller of any and all motor vehicle taxed levied or imposed by said State, together with all penalties and/or interest thereon and all fines which may be levied for any violations of said statute, and generally conditioned upon faithful compliance with the provisions of said statute, the total amount of such bond to be fixed by said Comptroller but to be not less than Three Thousand Dollars ($3,000.00) nor more than Fifty Thousand Dollars ($50,000.00). Said [fol. 6] statute further requires upon the filing of said application for license by such "distributor" the payment of a license fee by such "distributor" to said Comptroller in the sum of Twenty-Five Dollars ($25.00) for each distribution station or place of business or agency of the "distributor". Said statute further provides that such "distributor" shall monthly file a report with the State Comptroller, showing the details as specified in such statute, including the total number of gallons of motor fuel used in said State during the preceding month by such "distributor" and accompanying said report by remittance of the amount of excise taxes provided by said statute upon gasoline so used by said "distributor". Said statute further provides that as a penalty for the non-payment of the tax at the time and in the manner by such statute provided, there shall be added thereto five per cent (5%)

thereof, together with interest at the rate of one per cent (1%) per month until paid and further that, if attorneys are employed to collect such delinquent tax, ten per cent (10%) of the taxes, penalty and interest shall be added thereto as part of the cost of collection and paid by said "distributor" to said attorney or attorneys. Said statute further provides that upon failure of such "distributor" to file the required monthly reports of gallons of gasoline used, the State Comptroller shall determine from any information obtainable the number of gallons of motor vehicle fuel with respect to which the "distributor" has incurred liability under the Motor Vehicle Fuel Tax Laws of said State and compute the taxes, penalties and interest thereon and that, in any action or proceeding for the collection of such taxes, interest or penalties, such assessment by the State Comptroller shall constitute prima facie evidence of the claim of the State, and the burden of proof shall be upon the "distributor" to show that the assessment was incorrect and contrary to law. Said statute further provides that, should the "distributor" neglect or refuse to pay the said tax, the amount thereof with interest, penal- [fol. 7] ties and other additions thereto shall be a lien in favor of the State upon all franchises, property and rights to property, whether real or personal, then belonging to or thereafter acquired by such "distributor", said statute further providing the details as to the application, enforcement and effect of said lien. Said statute further provides that if any "distributor" shall be in default for more than ten days in the payment of any said taxes, interest and penalties, the State Comptroller may issue a warrant under the official seal of his office directed to the sheriff of any County in the State, commanding said sheriff to levy upon and sell the goods and chattels of such "distributor", without exemption, found within his jurisdiction for the payment of the amount of said delinquency, further providing the details of such procedure. Said statute further provides that whenever such "distributor" ceases to engage in business as such within said State, including discontinuance by sale or transfer, it shall be the duty of such "distributor" to notify the State Comptroller in writing at least ten (10) days prior to the time the discontinuance, sale or transfer takes effect, said statute giving the details concerning such notice, and that all said taxes, penalties and interest shall become due and payable concurrently with such

discontinuance, sale or transfer, and that the same shall then be reported and paid; and further provides that, unless the said notice shall have been so given, the purchaser or transferee shall be liable to said State for the amount of all taxes, penalties and interest to the extent of the value of the property and business to be acquired by such "distributor". Such statute contains many other additional provisions applicable to the facts hereinafter stated and effecting plaintiff's cause of action as herein set forth.

VI

Plaintiff is engaged exclusively in the business of operating, as a common carrier, motor propelled vehicles for [fol. 8] the transportation of persons and property between fixed termini and over regular routes, for compensation, over the public highways of various states, including the public highways of the State of New Mexico, said business being exclusively and entirely limited to interstate commerce, and, as relates to the matters herein stated, to the business of such interstate common carrier transportation of persons and property between the cities of Los Angeles, California, and El Paso, Texas, which routes include public highways of the State of New Mexico. Neither the plaintiff nor its predecessors in interest have heretofore engaged in any intrastate commerce within the State of New Mexico, nor is plaintiff now so engaged, nor does plaintiff desire to engage therein, nor in any manner offer service in, make investments for, or submit to regulations exclusively applying to, or to taxation or other local burdens exclusively applying to intrastate commerce; nor has the plaintiff or its predecessors in interest at any time sold or offered for sale, nor does it intend to sell, within the State of New Mexico any gasoline whatsoever, or in any other manner deal with gasoline, its manufacture, sale, transportation or distribution except to use the same as motor fuel in the manner and to the extent hereinafter stated.

VII

That the motor vehicles so operated by plaintiff and its predecessors in interest are propelled by internal combustion motors wherein gasoline is used as a fuel; that said fuel is entirely purchased at retail and is placed in its tanks built in and contained in said motor vehicles in the ordi-

nary and customary manner provided for the carrying and using of the gasoline for developing said motive power; that at none of the times herein mentioned did plaintiff store any gasoline at any place within the State of New Mexico or withdraw the same for use within the State of New Mexico except for regular licensed distributors maintaining service stations for distribution of such gasoline [fol. 9] along said highway route; that of necessity in the conduct of said interstate commerce such motor fuel is purchased and placed in the tanks of the vehicles in other states than the State of New Mexico and in which such taxes on said gasoline as may be provided or required by such respective states, is paid at the time of purchase thereof, and in the course of the conduct of said interstate commerce in the manner aforesaid there is transported into and through New Mexico the gasoline so placed in said tanks that is being used to propel said vehicles; that said interstate commerce is conducted on through trips made by said vehicles, the operation being continuous through the entire State of New Mexico except for the necessary stops for the convenience of said interstate passengers.

VIII

That on or about the 30th day of April, 1935, the said defendants acting through the Gasoline Tax Department, Bureau of Revenue of said State of New Mexico, made written demand upon this plaintiff for compliance with said statute hereinbefore referred to, a copy of said demand being hereto annexed and marked "Exhibit A." By such written demand, said defendants have applied said statute to this plaintiff as a carrier in interstate commerce and to the use of its facilities in interstate commerce, demanding that this plaintiff make application for a license as "distributor" and pay the license fee with penalties and interest as required by said Chapter 176 of said Session Laws of 1933; further notifying plaintiff that it is deemed by said defendants to be a "distributor" within the meaning of said statute and that it was and is unlawful for such "distributor" to use motor fuel unless such "distributor" is the holder of an uncancelled license; said defendants thereby further demanded that this plaintiff furnish surety to the State of [fol. 10] New Mexico in the amount of Six Thousand Dollars ($6,000.00) for the purposes in said statute provided;

said defendants further thereby notified this plaintiff of an arbitrary assessment of excise taxes covering the gasoline used in operating in such interstate commerce by plaintiff and its predecessors in interest, covering a period from April, 1932, to April, 1935, which, with penalties and interest, constituted a total demand against plaintiff, by reason of the application of said statute, in the sum of Seven Thousand Eighty Dollars and Forty-nine Cents ($7,080.49), and making said demand that payment thereof be made by plaintiff by return mail.

IX

That the plaintiff and its predecessors in interest have in all respects complied with such statute in relation to all gasoline or motor fuel purchased, acquired or withdrawn from storage within the State of New Mexico and that the said claim against the said plaintiff so made as aforesaid for excise taxes relates to gasoline alleged to have been purchased and placed in the fuel tanks of the respective vehicles in other states than the State of New Mexico.

X

That the plaintiff and its predecessors in interest have since said date of April, 1932, been conducting said operation in interstate commerce and are still conducting the same; that, although the operation of this plaintiff, as conducted by it, extends only between the cities of Los Angeles, California, and El Paso, Texas, the same is conducted in connection with other interstate bus operations east of El Paso, Texas, serving all parts of the United States and that the interstate business therefore of this plaintiff includes the transportation of such interstate passengers through the State of New Mexico who are arriving from and destined to fully fifty per cent (50%) of the [fol. 11] States of the Union; that at least one schedule is operated in each direction daily; that the operative rights, permits, certificates of public convenience and necessity, and franchises now owned by the plaintiff constitute a large portion of the actual property value of said business amounting to an excess of Three Thousand Dollars ($3,000.00); that, in the conduct of such interstate commerce, it is absolutely necessary to traverse the highways of the State of New Mexico and if, due to the application of said

statute, defendants should cause a lien to be placed on said operative rights in the State of New Mexico and foreclosed or should otherwise prohibit plaintiff from operating its vehicles of interstate commerce over the highways of the State of New Mexico, the entire value of all of the properties, operative rights, permits and franchises of the plaintiff would be lost; that due to the nature of the operative rights and laws of the various jurisdictions, state and national, applying thereto, the discontinuance of operation, even though temporary, would be liable to cause the loss and forfeiture of all of said operative rights as well as the complete loss of the good will of said operation which alone has a value in excess of Three Thousand Dollars ($3,000.00).

XI

That in the conduct of such interstate commerce by plaintiff, plaintiff is required to employ drivers, agents and other representatives to actually conduct said business and to place in charge of its said motor vehicles, employees whose duty it is to use the gasoline that is provided by the company as aforesaid in propelling its vehicles; that the defendants threaten to enforce said statute against plaintiff and its said employees and to cause their arrest, as well as to compel the payment of the said licenses, taxes, fines, penalties, interests and costs as hereinbefore alleged, each and every of which threatened acts will cause this plaintiff great and irreparable injury; that each day that plaintiff is prohibited from operating its said business and [fol. 12] interstate commerce through the State of New Mexico it will suffer material and irreparable loss thereby, to-wit in excess of two hundred dollars per day due to loss of patronage.

XII

That because of the provisions of said statute whereby each day or part thereof during which this plaintiff as an alleged "distributor" shall, as such law is sought to be applied by said defendants, use gasoline in the State of New Mexico without being the holder of an uncancelled license, constitutes a separate criminal offense, plaintiff is compelled against its will to either forthwith submit to the unlawful license and excise tax provisions of such statute

or incur the liability for excessive penalties because of alleged daily infraction of said statute.

XIII

That the said defendants and each of them threaten to and will, unless restrained by an order of this Court, cause the immediate arrest of the officers and employees of plaintiff on each occasion that plaintiff may operate its interstate business aforesaid in the State of New Mexico and will cause liens to be filed against the franchises and property and rights of this plaintiff and will cause the sale thereof and that plaintiff and its employees will also be arrested by and through the action of defendants in the enforcement of said statute for alleged past offenses under said statute, to-wit: daily use of motor fuel in the State of New Mexico without being a licensed "distributor", failure to file monthly reports since April, 1932, as to gasoline so used; failure to make payments of excise taxes, penalties and interest and for many other possible alleged offenses defined in such statute but not lawfully applicable in any manner or at all to this plaintiff in its conduct of interstate commerce and in its purchase of gasoline in other states and using the same from its motor vehicle tanks while tra- [fol. 13] versing the highways of the State of New Mexico.

If defendants do as threatened, plaintiff will suffer irreparable injury and will be subject to a multiplicity of suits, will be subjected to heavy and severe penalties, be required to furnish many heavy bail bonds, and be compelled in the protection of its business from entire loss to comply with such statute if financially able to do so, regardless of its legality, or the merits of defense; that plaintiff is not financially able to pay the demands so placed upon it for taxes, licenses, interest and penalties and that, therefore, if defendants do as threatened, the interstate business of plaintiff will be unduly burdened and destroyed, all of which will cause plaintiff great and irreparable injury, and will absolutely prohibit plaintiff from engaging in interstate commerce.

XIV

That the specific undue and unlawful burdens on interstate commerce so imposed by such statute and the application of said statute by defendants and which plaintiff claims

are in direct contravention with the provisions of the Constitution of the United States hereinafter referred to, include the following:

That said statute imposes as a condition for a foreign corporation engaging in interstate commerce the qualification under state law to engage in a separate and distinct form of intrastate commerce.

By legislative declaration, it compels an interstate carrier against its will to become a "distributor" of gasoline subject to state license and regulation.

Said statute imposes a privilege tax of five cents (5¢) per gallon on the right to use gasoline as a facility of interstate commerce.

Said statute requires as a condition for a foreign corporation engaged in interstate commerce receiving said license, the domestication of such foreign corporation within the State of New Mexico, with the consequent burdens of [fol. 14] expenditures by such foreign corporation in payment of fees and costs thereof, designation of statutory agent and filing of corporation statements and declarations over which said State has no lawful jurisdiction as to a purely interstate carrier.

Said statute requires the filing by such interstate carrier of large and excessive bonds conditioned upon compliance by an interstate carrier with numerous state statutory requirements that are each an undue burden on interstate commerce, unlawful and void.

Said statute requires the payment of license fees as a privilege for using facilities in interstate commerce and without the payment of which interstate commerce may not lawfully be engaged in within the terms of said statute.

Said statute requires payment of said license fee, not only as to the interstate carrier for the privilege of engaging in interstate commerce but a separate license fee for each place of business or agency that such interstate carrier may maintain within said State.

Said statute requires the filing of a bond by an interstate carrier among the conditions of which are not only the payment of taxes, penalties and interest imposed by said statute, but also the payment of fines in criminal cases not yet instituted.

That in requiring the bond for the payment of fines imposed by said statute, the statute directly connects the penal

sections of said statute and the compliance therewith by interstate carriers with the conditions of the civil sections of said statute that impose conditions precedent upon the interstate carrier in his exercise of his rights to engage in interstate commerce.

Said statute imposes upon the interstate carrier requirement of filing of monthly reports of gasoline used by the interstate carrier as a facility in its interstate commerce and the paying of an excise tax thereon, regardless of the [fol. 15] place of purchase, storage, or withdrawal or the situs of such gasoline within or without said State, or its use or transportation by such interstate carrier in interstate commerce.

Said statute requires a carrier engaged solely in interstate commerce to make monthly reports to said State concerning the use of its interstate facilities, not for police or regulatory requirements, but solely for the purpose of assessment and collection of excise taxes on the privilege of engaging in interstate commerce and using the facilities thereof.

Said statute provides diverse and severe penalties and interest for the non-payment of said unlawful excise taxes by said interstate carrier.

That said statute imposes upon such interstate carrier the further requirements to pay large sums of money as attorney fees in addition to said taxes, interest and penalties if said State shall employ attorneys to collect such tax.

Said statute vests complete jurisdiction in the State Comptroller of the State of New Mexico to authorize or withdraw authorization to use gasoline as an instrumentality of interstate commerce within the State of New Mexico.

Said statute allows said State Comptroller to make arbitrary assessments of such excise taxes if the user of gasoline as a facility in interstate commerce shall fail to make a report of the amount so used.

Said statute makes such excise taxes, interest, penalties and other additions to such taxes a lien in favor of the State upon all franchises, property and rights of the interstate carrier and authorizes the State to sell such franchises, property and rights of the interstate carrier in the satisfaction of such lien.

Said statute authorizes, without any process of law whatsoever, the State Comptroller to issue a warrant directed to

a County Sheriff to levy upon and sell the property of such user of gasoline in interstate commerce without exemption, [fol. 16] in payment of such excise taxes, interest, penalties, and by said statute, such warrant so issued without any judicial procedure whatsoever, is given the effect of an execution issued out of the District Court of the State of New Mexico.

Said statute further imposes such lien for excise taxes, interest and penalties upon the property of the successor in interest of the user of such gasoline as a facility of interstate commerce.

Said statute requires such user of gasoline as a facility in interstate commerce to maintain for two years records of gasoline used, as well as other records that may be required by the State Comptroller, not for purpose of police regulation but solely for the purpose of facilitating the administration of the said unlawful license and privilege taxes on the use of facilities in interstate commerce.

Said statute requires the user of gasoline as a facility in interstate commerce who purchases gasoline outside of the State of New Mexico to carry a manifest prescribed by the said State Comptroller relating to the gasoline so used, with various conditions and requirements concerning such manifest.

Said statute provides severe fines and imprisonment for violation thereof in any particular including those particulars hereinbefore mentioned, especially providing that each day or part thereof during which any person or corporation, including an interstate carrier using gasoline as a facility in interstate commerce, defined as a "distributor", shall engage in business as such "distributor" without holding an uncancelled "distributor" license, shall constitute a separate offense.

XV

That for the reasons aforesaid, plaintiff has no plain, speedy, adequate or complete remedy at law; plaintiff is definitely deprived of its constitutional right to engage in interstate commerce without submitting to the said unlawful rules, regulations and license and tax requirements of [fol. 17] said State of New Mexico, all of which constitute an undue burden on interstate commerce.

XVI

That by reason of said acts and threatened acts on the part of defendants, unless the injunction herein prayed for do forthwith issue, plaintiff will be forthwith and continuously unlawfully deprived of his constitutional rights, to-wit:

(1) The right to engage in interstate commerce without the same being unduly burdened by the action of the State of New Mexico and these defendants as officers thereof, as guaranteed by Art. I, Section 8, Clause 3, of the Constitution of the United States.

(2) The right to not be deprived of liberty and property without due process of law as guaranteed by Amendment V to the Constitution of the United States.

(3) The right to not be subjected to the imposition of excessive fines, to cruel and unusual punishment, and to not be required to furnish excessive bail, as guaranteed by Amendment VIII to the Constitution of the United States.

(4) The right to be free from the imposition or enforcement by the State of New Mexico, or by these defendants, as officers thereof, of any law of said State of New Mexico, abridging the privileges and immunities of citizens of the United States, or of this plaintiff, or depriving said plaintiff or its employees of liberty or property without due process of law, or denying to plaintiff the equal protection of the laws, as guaranteed by Amendment XIV to the Constitution of the United States.

Wherefore plaintiff prays for a decree of this Court as follows:

(1) That a writ of interlocutory injunction issue from this Court under seal thereof directed to the said defendants and each of them, restraining and enjoining said defendants and each of them and/or their successors in office, and all per- [fol. 18] sons acting in aid of said defendants or either of them, or their successors in office, from arresting or causing or authorizing the arrest of plaintiff, or its agents or employees, or otherwise preventing or interfering with plaintiff in its conduct of its operation of buses as a common carrier of passengers and property for compensation over

the public highways of the State of New Mexico in interstate commerce, because of any alleged noncompliance with Chapter 176 of the Session Laws of 1933 of the State of New Mexico (including amendments thereto) so far as relates to gasoline or other motor fuel purchased by plaintiff or its predecessors in interest, or to be purchased by plaintiff, within other states than the State of New Mexico, and placed or to be placed in its vehicles in other states than the State of New Mexico, and used in said vehicles for the propelling of the same in interstate commerce within the State of New Mexico; or from enforcing said Statute in any other manner against this plaintiff or its predecessors in interest by reason of the use of gasoline or other motor fuel within the State of New Mexico that shall have been or shall be acquired and used as aforesaid, until final termination of this cause or until the further order of this Court.

(2) That a temporary Restraining Order or Injunction issue forthwith restraining and enjoining said defendants and each of them and/or their successors in office, and all persons acting in aid of said defendants or either of them, or their successors in office, in the same manner and to the same extent as is herein set forth in Paragraph (1) of this prayer, until the interlocutory injunction herein prayed for shall issue.

(3) That on hearing hereof it be adjudged and decreed by this Court that said statute of the State of New Mexico is unconstitutional, null and void in its aforesaid application to this plaintiff and the gasoline or other motor fuel purchased or acquired by plaintiff or its predecessors in interest outside of the State of New Mexico and at such place of purchase or acquisition placed within its vehicles [fol. 19] for use in its conduct of its business of interstate commerce, though used within the State of New Mexico in the conduct of such interstate commerce, and that said interlocutory injunction be made permanent, subject to such orders, reservations and restrictions as the Court may deem proper.

(4) That plaintiff have such other, further and different relief as to the Court may seem meet and equitable in the premises.

And plaintiff will ever pray.

Golden Eagle Western Lines, Inc., by D. Grant, President. E. R. Wright, Santa Fe, New Mexico, Attorney for Plaintiff. Earl A. Bagby, Attorney for Plaintiff, No. 560 South Los Angeles St., Los Angeles, California.

Duly sworn to by D. Grant. Jurat omitted in printing.

[fol. 20] EXHIBIT "A" TO BILL OF COMPLAINT

State of New Mexico,

Bureau of Revenue,

Gasoline Tax Department

Santa Fe, New Mexico, April 30, 1935.

Golden Eagle Western Lines, Inc., and/or Golden Eagle Bus Lines, 1268 S. Alvarado St., Los Angeles, Calif.

GENTLEMEN:

We attach hereto for your convenience our form Application for License for Distributor of Motor Fuel, which you will kindly fill out and return to this office, together with the license fee of $25.00, penalty $1.25 and interest to date $1.25, as required by Chapter 176 of the Session Laws of 1933, under sub-section 2, paragraph C, of Section 1, defining a distributor of motor fuel within the State of New Mexico, which sub-section I am quoting as follows:

"consuming or using in the State of New Mexico any motor fuel so imported, who shall have purchased or otherwise acquired the same before it shall have been received by any other person in this state within the meaning of this act."

Under Section 3 of this act, "it shall be unlawful for any distributor to import, receive, *use*, sell or distribute any motor fuel * * * unless such distributor or retail dealer is the holder of an uncancelled license."

Under Section 4 of this act, it will be necessary that you place surety bond with the State of New Mexico in the amount of $6000.00.

[fols. 21-25] We are unable to find where your firm has made any return to this department for the 5¢ per gallon excise tax as covered in Section 2 of this act. We are therefore requesting payment in the amount of $5,792.45 excise tax covering the gasoline used in operating your motor coaches over the highways of this state from April 1932 to date. This assessment is based on the mileage covered as reported by you to the State Corporation Commission, using the basis of 3 miles per gallon on which to assess the tax.

Under Section 5 of this act it becomes necessary that each distributor make return not later than the 25th day of each calendar month of the amount of tax due from the same. Because this was not done, it is necessary that we add to the amount of tax a five (5) per cent penalty and one (1) per cent interest per month, the total amount of penalty being $289.69 and the total amount of interest being $998.35, making a total due from you of $7080.49.

This penalty and interest is covered by Section 8.

We are attaching hereto schedule on which we base our assessments and for your convenience a copy of the law which is quoted above.

We will expect remittance by return mail.

Very truly yours, (Sgd.) S. W. Burr, Special Auditor-Collector.

SWB:D. encl.

[fol. 26] IN UNITED STATES DISTRICT COURT

ANSWER OF JOHN D. BINGAMAN, AS COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO; JUAN N. VIGIL, AS STATE COMPTROLLER OF THE STATE OF NEW MEXICO; FRANK H. PATTON, AS ATTORNEY GENERAL OF THE STATE OF NEW MEXICO; JUANITA HILL, AS STATE GASOLINE TAX COLLECTOR OF THE STATE OF NEW MEXICO, AND CLYDE TINGLEY AS GOVERNOR OF THE STATE OF NEW MEXICO—Filed June 8, 1935.

Come now the above named defendants, John D. Bingaman, Juan N. Vigil, Frank H. Patton, Juanita Hill and Clyde Tingley in their respective official capacities as hereinabove set forth and answer the Bill of Complaint filed [fol. 27] in this cause and say for answer thereto:

1. Defendants admit the allegations set forth in Paragraph I of the Bill of Complaint filed herein.

2. The defendants admit the allegations of Paragraph II of the said Bill of Complaint, except as to the allegation therein contained stating that James J. Connelly is the Commissioner of Revenue of the State of New Mexico and allege the fact as to said allegation to be that at the time of the filing of the said Bill of Complaint the said James J. Connelly was Commissioner of Revenue of the State of New Mexico but that subsequent to the filing of said Bill of Complaint and the service thereof upon the defendants in said cause, the defendant, John D. Bingaman, was appointed as Commissioner of Revenue of the State of New Mexico in the place of James J. Connelly; that on the — day of May, 1935, plaintiff filed in this cause a motion to substitute the said John D. Bingaman as the defendant in the place of James J. Connelly and that this Court entered an order on the — day of May, 1935, substituting the said John D. Bingaman as Commissioner of Revenue of the State of New Mexico for the said James J. Connelly.

3. The defendants admit the allegations set forth in Paragraph III of said Bill of Complaint.

4. The defendants admit the allegations set forth in Paragraph IV of said Bill of Complaint.

5. In answer to Paragraph V of said Bill of Complaint, defendants deny that at all times mentioned in said Bill of Complaint there has been in the State of New Mexico a statute of the said State known as Chapter 176, Session Laws of 1933, and state the fact to be that the said statute, Chapter 176 of the Session Laws of 1933, became effective on the 12th day of June, 1933, and has been effective subsequent to that time during all of the times mentioned in said Bill of Complaint; that prior to the effective date of [fol. 28] Chapter 176 of the Session Laws of 1933, there was in force and effect in the State of New Mexico a statute of said State known as Chapter 29 of the Session Laws of 1929, which was in effect in said State from March 7, 1929, to June 12, 1933; that said Chapter 29 of the Laws of 1929 purported to levy an excise tax of five cents (5¢) per gallon upon the use of all gasoline and motor fuel used in this State for any purpose. A portion of the tax which defendants are attempting to collect from plaintiff is by virtue

of the said Chapter 29 of the Laws of 1929. Defendants admit the other allegations set forth in said Paragraph V of the Bill of Complaint, relative to the provisions of Chapter 176 of the Laws of 1933, but allege that the provisions of said statute are applicable to all persons, firms and corporations using, selling and distributing gasoline within the State of New Mexico, and are not confined particularly to corporations, or any certain class of corporations, as indicated by the allegations of the Bill of Complaint.

6. Answering the allegations set forth in Paragraph VI of the Bill of Complaint, defendants admit that plaintiff is engaged exclusively in the business of operating as a common carrier, motor propelled vehicles for the transportation of persons and property between fixed termini and over regular routes for compensation over the public highways of various states, including the public highways of the State of New Mexico, and that their business is exclusively and entirely limited to interstate commerce and, as relates to the matters stated in said Bill of Complaint, to the business of such interstate common carrier transportation of persons and property between the cities of Los Angeles, California, and El Paso, Texas, which routes include public highways of the State of New Mexico. Defendants do not have sufficient knowledge or information to answer the allegations to the effect that neither the plaintiff nor its predecessors in interest have heretofore engaged in any intrastate commerce within the State of New Mexico but state that in so far as the claim for the [fol. 29] taxes due the State of New Mexico by plaintiff as set forth in the Bill of Complaint, defendants do not rely upon plaintiff conducting any intrastate business in order to enforce the payment of said taxes and admit that in so far as plaintiff's operations through the State of New Mexico are concerned in the matters involved in this suit, that plaintiff is solely an interstate common carrier. Defendants do not have sufficient knowledge or information to answer the allegation in the Bill of Complaint to the effect that plaintiff does not desire to engage in intrastate business nor to offer services in making investments for or submit to regulations exclusively applying to, or to taxation or other local burdens exclusively applying to intrastate commerce, and therefore deny such allegations on information and belief. Defendants admit that plaintiff

and its predecessors in interest have not, during the times involved in this suit, sold or offered for sale within the State of New Mexico any gasoline, but defendants do not have any knowledge or information sufficient to answer the allegation that plaintiff does not intend to sell or in any other matter deal with gasoline within the State of New Mexico, and therefore deny such allegation on information and belief.

7. Defendants admit that the motor vehicles so operated by plaintiff and its predecessors in interest are propelled by internal combustion motors wherein gasoline is used as a fuel, and that said fuel is entirely purchased at retail and is placed in its tanks, built and contained in said motor vehicles, in the ordinary and customary manner provided for carrying and using of the gasoline for developing said motive power. Defendants further admit that at none of the times herein mentioned did plaintiff store any gasoline at any place within the State of New Mexico or withdraw the same for use within the State of New Mexico except as the same was stored into tanks upon the motor busses used in its interstate business and withdrawn from the said tanks directly into the internal combustion engines propelling said vehicles. Defendants [fol. 30] deny the allegation to the effect that of necessity in the conduct of said interstate commerce such motor fuel is purchased and placed in the tanks of the vehicles in other states than the State of New Mexico, and in which such taxes on said gasoline as may be provided or required by such respective states is paid at the times of purchase thereof and state the facts to be that plaintiff purchases practically all, if not all, of its gasoline used to propel its motor busses outside of the State of New Mexico, although the gasoline is for sale and may be bought within the State of New Mexico along the route of plaintiff's busses just as well as it can be purchased outside of the State of New Mexico. Defendants further allege that all of the gasoline used by plaintiff for its busses on its westbound trips through the State of New Mexico is purchased by plaintiff at La Tuna, Texas, which town of La Tuna is situated on the boundary line between Texas and New Mexico, and that although plaintiff pays the gasoline tax required to be paid by the State of Texas on the gasoline so purchased, it has, since the 6th day of January, 1934, and does now,

obtain a refund of all of the state tax paid to the State of Texas on the gasoline so purchased for the reason that plaintiff is using said gasoline outside of the State of Texas. Defendants admit the allegation that in the course or conduct of said interstate commerce in the manner set forth in the Bill of Complaint, there is transported into and through New Mexico the gasoline so place- in said tanks that is being used to propel said vehicles; and that said interstate commerce is conducted on through-trips made by said vehicles, the operation being continuous through the entire State of New Mexico except for the necessary stops for the convenience of said interstate passengers.

8. Defendants admit the allegations set forth in Paragraph VIII of said Bill of Complaint.

9. Defendants do not have sufficient information or knowledge to answer the allegation to the effect that plain- [fol. 31] tiff and its predecessors in interest have in all respects complied with such statute in relation to all gasoline or motor fuel purchased, acquired or withdrawn from storage within the State of New Mexico, and therefore deny the same on information and belief. Defendants admit, however, that the said claim against said plaintiff so made as set forth in the Bill of Complaint for excise taxes relates to the gasoline alleged to have been purchased and placed in the fuel tanks of the respective vehicles in other states than the State of New Mexico.

10. Defendants admit the allegations to the effect that plaintiff and its predecessors in interest have since the date of April, 1932, been conducting said operation in interstate commerce and are still conducting it. Defendants do not have sufficient knowledge or information to answer the allegation in said Paragraph X of the Bill of Complaint to the effect that although the operation of this plaintiff, as conducted by it, extends only between the cities of Los Angeles, California, and El Paso, Texas, the same is conducted in connection with the other interstate bus operations east of El Paso, Texas, serving all parts of the United States and that the interstate business, therefore, of the plaintiff includes the transportation of such interstate passengers through the State of New Mexico who are arriving from and destined to fully fifty per cent (50%) of the states of the Union, and therefore deny the same on infor-

mation and belief. Defendants admit that at least one schedule is operated across the State of New Mexico in each direction daily. Defendants do not have sufficient knowledge or information to answer the allegation in Paragraph X of said Bill of Complaint to the effect that the operative rights, permits, Certificates of Public Conveyance and Necessity and franchises now owned by plaintiff constitute a large portion of the actual property value of said business amounting to an excess of Three Thousand Dollars ($3,000.00) and that in the conduct of such interstate commerce, it is absolutely necessary to traverse the highways of the [fol. 32] State of New Mexico and due to the application of said statute defendants cause a lien to be placed on said operative rights in the State of New Mexico and foreclosed, or should otherwise prohibit plaintiff from operating its vehicles of interstate commerce over the highways of the State of New Mexico, the entire value of all the properties, operative rights, permits and franchises of the plaintiff would be lost and that due to the nature of the operative rights and loss of the various jurisdictions, state and national, applying thereto, the discontinuance of operation, even though temporary, would be liable to cause the loss and forfeiture of all of said operative rights as well as the complete loss of the good will of said operation which alone has a value in excess of Three Thousand Dollars ($3,000.00) and defendants therefore deny said allegations on information and belief.

11. Answering Paragraph XI of said Bill of Complaint defendants admit that they threaten and intend to enforce said statutes against plaintiff and its said employees and to compel the payment of said licenses, taxes, fines, penalties, interest and costs as set forth in said Bill of Complaint. Defendants state that they do not have sufficient knowledge or information to answer the allegations in said Paragraph XI of the Bill of Complaint to the effect that the threatened acts of defendants will cause plaintiff great and irreparable injury and that each day plaintiff is prohibited from operating its said business and interstate commerce through the State of New Mexico, it will suffer material and irreparable loss thereby, to-wit, in excess of Two Hundred Dollars ($200.00) per day due to loss of patronage, and therefore deny the same on information and belief.

12. Defendants admit the allegations set forth in Paragraph XII of the bill of Complaint except that they deny that the license and excise tax provided by the New Mexico statutes hereinabove referred to are unlawful and further [fol. 33] deny that the penalties provided by said statutes on account of a violation thereof are excessive.

13. Defendants admit that they intend to enforce the provisions of the said New Mexico statutes referred to with respect to plaintiff and its employees for the failure of plaintiff to comply with the provisions of the said New Mexico statutes as set forth in the Bill of Complaint, but defendants deny that the said statutes imposing an excise tax on the plaintiff for the use of the highways of New Mexico, measured by the number of gallons of gasoline so used, and requiring plaintiff to be licensed as a distributor in accordance with the terms thereof, and providing for penalties and interest for a violation of the terms of said statute are not lawfully applicable to this plaintiff. Defendants deny that if defendants do as threatened, plaintiff will suffer irreparable injury and will be subject to a multiplicity of suits, will be subjected to heavy and severe penalties, be required to furnish many heavy bail bonds and be compelled in the protection of its business from entire loss to comply with such statute if financially able to do so regardless of its legality or the merits of defense; that plaintiff is not financially able to pay the demand so placed upon it for taxes, licenses, interest and penalties and that, therefore, if defendants do as threatened the interstate business of plaintiff will be unduly burdened and destroyed, all of which will cause plaintiff great and irreparable injury and will absolutely prohibit plaintiff from engaging in interstate commerce.

14. Answering Paragraph XIV of the Bill of Complaint defendants deny that the statute or statutes in question impose any undue and unlawful burdens on interstate commerce and deny that said statute or statutes are in any way in contravention with the provisions of the Constitution of the United States.

Defendants deny that the said statute or statutes impose [fol. 34] as a condition for a foreign corporation engaging in interstate commerce, the qualifications under state law to engage in a separate and distinct form of intrastate commerce.

Defendants admit that by the terms of the said statutes any person, firm or corporation using gasoline in the State of New Mexico where there has been no prior sale within the State is, under the definitions of said statute, designated a "distributor" of gasoline, but further state that the designation of such person as a "distributor" is only a means of insuring the collection of the gasoline tax due to the state by the terms of said law and does not impose any undue burden on interstate commerce.

Defendants deny that the said statute or statutes impose a privilege tax of five cents (5¢) per gallon on the right to use gasoline as a facility of interstate commerce but state the fact to be that the said statutes, which construed in connection with Chapter 31 of the Laws of 1931, impose a tax upon the privilege of using the public highways of the State of New Mexico, which tax is measured by the number of gallons of gasoline used on said public highways.

Defendants deny that said statute or statutes require as a condition for a foreign corporation engaged in interstate commerce receiving said licenses, the domestication of such foreign corporation within the State of New Mexico with the consequent burdens of expenditures by such foreign corporation in payment of fees and costs thereof, designation of a statutory agent and filing of corporation statements and declarations over which said State has no lawful jurisdiction as to a purely interstate carrier.

Defendants deny that said statute requires the filing by such interstate carrier of large and excessive bonds conditioned upon compliance by an interstate carrier with numerous state statutory requirements that are each an undue burden on interstate commerce unlawful and void, [fol. 35] but state the fact to be that the bond required to be filed by the said statute is reasonable and that all other requirements of the statute are reasonable and lawful and are only for the purpose of insuring the collection by the state of tax lawfully due it.

Defendants deny that said statute or statutes require the payment of license fees as a privilege for using facilities in interstate commerce and without the payment of which interstate commerce may not lawfully be engaged in within the terms of said statute.

Defendants deny that said statute or statutes require payment of a license fee not only as to the interstate carrier for the privilege of engaging in interstate commerce but

in a separate license fee for each place of business or agency that such interstate carrier may maintain within such state.

Defendants deny that said statute or statutes required the filing of a bond by an interstate carrier among the conditions of which are not only the payment of taxes, penalties and interest imposed by said statute, but also the payment of fines in criminal cases not yet instituted and state the fact to be that the condition of the bond required to be filed is only the payment of the taxes lawfully due the State of New Mexico under and by terms of the said statute.

Defendants deny the allegation that in requiring the bond for the payment of fines imposed by said statute, the statute directly connects the penal sections of said statute and the compliance therewith by interstate carriers with the condition of the civil sections of said statute that impose obligations precedent upon the interstate carrier in his exercise of his rights to engage in interstate commerce.

Defendants deny the allegation that said statute or statutes impose upon the interstate carrier requirement of [fol. 36] filing of monthly reports of gasoline used by the interstate carrier as a facility in its interstate commerce and the paying of an excise tax thereon regardless of the place of purchase, storage or withdrawal or situs of such gasoline within or without said state, or its use or transportation by such interstate carrier in interstate commerce, and defendants state the facts to be in connection with said allegation that the said statutes in question do not require monthly reports from any users of gasoline within the State of New Mexico when the gasoline so used has been purchased within the state and the tax imposed by the said statute paid thereon but only requires a report of the use of said gasoline where no tax has heretofore been paid thereon to the State of New Mexico.

Defendants deny the allegation that said statute or statutes require a carrier engaged solely in interstate commerce to make monthly reports to said state concerning the use of its interstate facilities, not for police or regulatory requirements, but solely for the purpose of assessment and collection of excise taxes on the privilege of engaging in interstate commerce and using the facilities thereof.

Defendants deny the allegation that said statute or statutes provide diverse and severe penalties and interest for the non-payment of said unlawful excise taxes by said inter-

state carriers and state the fact to be that the taxes levied by said statutes are lawful and the penalties and interest provided upon the non-payment of said lawful taxes are reasonable and just.

Defendants deny the allegation that said statute or statutes impose upon such interstate carrier the further requirement to pay large sums of money as attorneys fees in addition to said taxes, interest and penalties, if said state shall employ attorneys to collect said tax, and state the fact to be that the provisions of said statute provide for the [fol. 37] collection of ten per cent (10%) additional as attorneys fees where suit is instituted to collect the said delinquent taxes.

Defendants deny the allegation that said statute vests complete jurisdiction in the State Comptroller of the State of New Mexico to authorize or withdraw authorization to use gasoline as an instrumentality of interstate commerce within the State of New Mexico.

Defendants deny the allegation that said statute allows said State Comptroller to make arbitrary assessments of such excise taxes as the user of gasoline if a facility in interstate commerce shall fail to make a report of the amount so used.

Defendants admit that the provisions of said statute make the amount of taxes due thereunder a lien in favor of the State upon all property within the State of all persons subject to the said tax when and if the said tax is not paid in accordance with the provisions thereof, but deny that the said provision as to the lien for the non-payment of tax applies solely to interstate carriers.

Defendants deny the allegation that said statute authorizes, without any process of law whatever, the State Comptroller to issue a warrant directed to a county sheriff to levy upon and sell the property of such user of gasoline in interstate commerce without exemption in payment of such excise taxes, interest, penalties and by said statute such warrant is so issued without any judicial procedure whatsoever is given the effect of an execution issued out of the District Court in the State of New Mexico.

Defendants deny the allegation that said statute further imposes such lien for excise taxes, interest and penalties upon the property of the successor in interest of the user of such gasoline as a facility of interstate commerce.

Defendants deny the allegation that said statutes requires such user of gasoline as a facility in interstate commerce to [fol. 38] maintain for two years records of gasoline used as well as other records that may be required by the State Comptroller, not for purpose of police regulation but solely for the purpose of facilitating the administration of said unlawful license and privilege taxes on the use of facilities in interstate commerce.

Defendants deny the allegation that said statute requires the user of gasoline as a facility in interstate commerce to purchase gasoline outside of the State of New Mexico, to carry a manifest specified by the said State Comptroller relating to the gasoline so used with various conditions and requirements concerning such manifest.

Defendants deny the allegation that said statute provides severe fines and imprisonment for violation thereof in any particular, including those particulars hereinbefore mentioned, especially providing that each day or part thereof during which any person or corporation, including an interstate carrier using gasoline as a facility in interstate commerce, defined as a "distributor", shall engage in business as such "distributor" without holding an uncancelled "distributor" license shall constitute a separate offense.

15. Answering the allegations contained in Paragraph XV of the Bill of Complaint, defendants deny that plaintiff is definitely deprived of its constitutional right to engage in intrastate commerce without submitting to unlawful rules, regulations and licenses and tax requirements of the State of New Mexico and deny that the statutes involved herein constitute any undue burden on interstate commerce.

16. Answering the allegations contained in Paragraph XVI of the Bill of Complaint, defendants deny that plaintiff will be deprived of its constitutional rights in any manner whatsoever by reason of the provisions of the statutes hereinbefore referred to.

[fol. 39] Defendants further deny the allegation that unless the Injunction prayed for in the Bill of Complaint is issued it will be deprived of its right to engage in interstate commerce without the same being unduly burdened by the action of the State of New Mexico and the defendants as officers thereof as guaranteed by Article I, Section 8, Clause 3 of the Constitution of the United States.

Defendants deny that plaintiff will be deprived of its liberty and property without due process of law as guaranteed by Amendment 5 to the Constitution of the United States.

Defendants deny that plaintiff will be subjected to the imposition of excessive fines, to cruel and unusual punishment and not required to furnish excessive bail as guaranteed by Amendment 8 of the Constitution of the United States.

Defendants deny that plaintiff will be deprived of the right to be free from the imposition or enforcement by the State of New Mexico or by the defendants as officers thereof of any law of said State of New Mexico abridging the privilege and immunities of citizens of the United States or of the plaintiff, or depriving said plaintiff or its employees of the liberty or property without due process of law, or denying to plaintiff the equal protection of the laws as guaranteed by Amendment 14 of the Constitution of the United States.

By way of further answer to the allegations set forth in the Bill of Complaint filed herein, defendants state:

(a) That the tax levied and imposed by Chapter 29 of the Session Laws of 1929 and by Chapter 176 of the Session Laws of 1933 is a non-discriminatory tax and is lawful in all respects as it affects the plaintiff herein; that Chapter 31 of the Laws of 1931 provides that the excise tax paid on gasoline in the State of New Mexico shall be refunded to [fol. 40] the person paying the same upon proper application as set forth therein in all cases where the gasoline has not been used upon the highways of the State of New Mexico; that the tax imposed by Chapter 29 of the Laws of 1929 and by Chapter 176 of the Laws of 1933 when taken into consideration with the provisions of said Chapter 31 of the Laws of 1931 is a tax upon the use of the public highways of the State of New Mexico measured by the number of gallons of gasoline used therein; that the proceeds of all of the said tax is distributed and disposed of by the terms of Section 60-205 of the New Mexico Statutes Annotated, 1929 Compilation, which said statute provides that the proceeds of said tax, except such portion thereof as may be necessary to pay the principle and interest of debentures issued hereunder, shall be paid into the State Treasury, covered into state road fund to be used for maintenance, construction and improvement of state highways and to meet the provi-

sions of the Federal Air road law; that such tax, if considered in the nature of a tax for the use of the state highways of the State of New Mexico, is a valid one even when imposed upon common carriers engaged solely in interstate commerce; that said tax is commensurate with and a fair charge for the use of the state highways by each person using them and is not discriminatory in any was upon persons engaged in interstate commerce.

(b) That even if the said tax imposed by Chapter 29 of the Laws of 1929 and by Chapter 176 of the Laws of 1933 is considered a tax upon the use of gasoline rather than upon the use of the public highways, still when said tax is considered in connection with Chapter 31 of the Laws of 1931 and with Section 60-205, New Mexico Statutes Annotated, 1929 Compilation, it is a tax which devolves only the use of gasoline upon publicly owned and maintained facilities, to-wit, the public highways of the State of New Mexico, and is valid as to an interstate carrier who obtains the bene- [fol. 41] fit of the use of such public highways.

(c) That the provisions of Chapter 176, Laws of 1933, requiring the filing of bonds and the obtaining of a license to persons subject to the payment of the said tax are nondiscriminatory and are only procedual matters to facilitate and insure the collection by the state of the taxes due it under the provisions of said law and all of such provisions are valid as to the plaintiff herein if the tax itself is sustained and found to be valid also.

Having thus made a full answer to all the matters and things contained in the Bill of Complaint, defendants pray that the Bill of Complaint be dismissed and for judgment for their costs in this behalf incurred.

Dated this 7th day of June, 1935.

Frank H. Patton, Attorney General, by J. R. Modrall, Assistant Attorney General, Attorneys for Defendants, John D. Bingaman, as Commissioner of Revenue of the State of New Mexico; Juan N. Vigil, as State Comptroller of the State of New Mexico; Frank H. Patton, as Attorney General of the State of New Mexico; Juanita Hill, as State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley, as Governor of the State of New Mexico.

Duly sworn to by Frank H. Patton. Jurat omitted in printing.

[fol. 42] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO FACTS—Filed July 1, 1935

It is hereby stipulated between the attorneys for the plaintiff and the Attorney General of the State of New Mexico, representing the above entitled defendants, that, for the purposes of hearing and trial of the above entitled cause the following may be taken and considered by the Court as true:

I

That the plaintiff is a corporation under the laws of the State of Delaware and having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California, and is a foreign corporation to the State of New Mexico.

II

That the defendants are all citizens and residents of the State of New Mexico and John D. Bingaman is the Commissioner of Revenue of the State of New Mexico; Juan N. Vigil is State Comptroller of the State of New Mexico; Frank H. Patton is Attorney General of the State of New Mexico; and Juanita Hill is State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley is Governor of the State of New Mexico, and are sued in their respective official capacities as named.

[fol. 43] III

That the Court sitting as a court of equity, has jurisdiction of the parties and of the subject matter hereof.

IV

That during all of the times mentioned in the bill of complaint the plaintiff and its predecessors in interest were and plaintiff still is engaged in the operation of motor busses as a common carrier of passengers between the City of Los Angeles in the State of California and the City of El Paso, Texas, over the public highways of said states and the states of Arizona and New Mexico, and that neither the plaintiff nor its predecessors in interest have at any time engaged in any intrastate business or service in the State of New Mexico.

V

That in its operations so conducted as aforesaid the plaintiff uses motor fuel, to-wit; gasoline for the propulsion of its busses, all of which gasoline concerned in this suit was purchased by the plaintiff at points outside of the State of New Mexico and at such points placed in the fuel tanks constituting regular equipment for said busses, and from said tanks used directly in the operation and propulsion of said motor busses over and across the public highways of the State of New Mexico; that none of the gasoline involved in this cause was stored or withdrawn from storage within the State of New Mexico except as the same was directly withdrawn from said standard equipment fuel tanks to the carburetors of said motor busses.

VI

That the plaintiff corporation during the times mentioned has operated one schedule in each direction each day through the State of New Mexico and is continuing so to do, all of the said schedules being a part of the continuous trip or trips between Los Angeles, in the State of California, and El Paso, in the State of Texas, or in the opposite direction from El Paso, Texas, to the city of Los [fol. 44] Angeles in the State of California.

VII

That beginning with the month of January, 1934, and since that date the plaintiff corporation has purchased the gasoline used to propel its motor busses upon the public highways of New Mexico on its west bound trips at La Tuna in the State of Texas (La Tuna being located at the state line between Texas and New Mexico) and as to the gasoline so purchased at La Tuna, in the State of Texas, beginning with the month of January, 1934, and continuously since that date, the plaintiff has received a refund of the Texas gasoline or motor fuel tax upon such gasoline used in its busses on west bound trips.

VIII

That on the east bound trips of said busses during all the times mentioned in the bill of complaint the gasoline

subject to this suit, which has been used for the operation of such busses over the public highways of the State of New Mexico, has been purchased in states west of New Mexico on which gasoline taxes have been paid either in California or Arizona.

There has been enacted by the legislature of the State of New Mexico the following relevant statutes: Chapter 29 of the Session Laws of 1929; Chapter 176 of the Session Laws of 1933; Section 2, Chapter 20 of the Session Laws of 1927 codified in the 1929 Compilation as Section 60-205; Chapter 31 of the Session Laws of 1931 as amended by Chapter 162 of the Session Laws of 1933; Chapter 129 of the Session Laws of 1929; Chapter 154 of the Session Laws of 1933.

IX

That the defendants have demanded and still demand of the plaintiff that it take out a distributor's license and pay a tax of five cents (5¢) per gallon upon each gallon of gasoline used on the public highways of the State of New [fol. 45] Mexico in the manner and form heretofore sent out under the authority of Chapter 29 of the Laws of 1929 and Chapter 176 of the Session Laws of 1933 and are threatening to enforce the provisions thereof as against the plaintiff, reference to the written demand marked Exhibit "A" and attached to plaintiff's complaint being hereby made; that the plaintiff has refused to take out the license or pay the tax as demanded; that the amount in controversy, exclusive of interest and costs, and a detriment to the plaintiff arising through the enforcing of said gasoline tax statute, if the enforcement thereof be unconstitutional, exceeds the sum of $3,000.00; that if the plaintiff should pay the demands made upon it as set out in the complaint, it has no remedy at law for the recovery of the money so paid, should it be determined that the application of the statute to plaintiff is unconstitutional; that there is no provision of law in New Mexico which would permit the plaintiff to pay the excise tax demanded under protest and to recover the same; that immediately upon payment of the tax under the provisions of Chapter 29 of the Session Laws of 1929, or Chapter 176 of the Session Laws of 1933 and within twenty-four hours after payment the same must be covered into the Treasury of the State

of New Mexico and that the same cannot be recovered from the Treasury except by legislative appropriation.

X

That if injunctive relief is not granted to the plaintiff restraining the enforcement of the provisions of the gasoline tax statute hereinbefore in this stipulation referred to, the defendants will proceed to the enforcement of the provisions of the statute as against the plaintiff, and that the effect of the enforcement of such provisions will be to prohibit plaintiff's operation of its vehicles through the state of New Mexico, unless and until it so complies with the provisions of such statute.

[fol. 46]

XI

That, in addition to the foregoing in the consideration and determination of the questions of law involved herein, the Court may consider any and all other facts of which it may properly take judicial knowledge, and nothing herein contained shall prevent any party hereto from submitting competent evidence of other or additional pertinent or material facts not contradictory of the facts herein stipulated.

XII

That the gasoline taxes collected by the State of New Mexico under the provisions of Chapter 29 of the Laws of 1929 and under the provisions of Chapter 176 of the Laws of 1933 are distributed and used by the State of New Mexico in accordance with the provisions of Sec. 60-205 of the New Mexico Statutes Annotated, Compilation of 1929.

XIII

That by nothing herein contained does any party hereto agree that all facts herein stipulated are relevant or material, and the right to object to any fact so stipulated on the ground of irrelevancy or immateriality is hereby reserved.

XIV

That on the facts the Court shall render such judgment and grant such relief as shall be just and proper under the

Constitution and laws of the United States and the Constitution and Laws of the state of New Mexico.

Respectfully submitted, Earl A. Bagby, E. R. Wright, Attorneys for Plaintiff. Frank H. Patton, Attorney General; Quincy D. Adams, J. R. Modrall, Assistant Attorneys General, Attorneys for Defendants.

[fol. 47] IN UNITED STATES DISTRICT COURT

Before McDermott and Bratton, Circuit Judges, and Nebiett, District Judge

OPINION—Filed July 19, 1935

Per CURIAM:

By Section 2, Chapter 176, Laws of 1933, the New Mexico legislature "levied and imposed an excise tax of five cents (5¢) per gallon upon the sale and use of all gasoline and motor fuel sold or used in this state for any purpose except gasoline sold in interstate commerce, * * *"

Plaintiff operates a bus line through New Mexico, doing no intrastate business. It buys no gasoline in the State,[1] Transcontinental Air Co. v. Lujan, 8 Pac. (2d) 103, nor does it store gasoline in the state, American Airways, Inc. v. Wallace, 57 F. (2d) 877, affd. 287 U. S. 565; Nashville C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249; American Airways, Inc. v. Grosjean, 3 F. Supp. 995, affd. 290 U. S. 596; Edelman v. Boeing Air Transport, Inc., 289 U. S. 249. The only use in the state to which plaintiff puts its gasoline is in propelling its busses, the gasoline being carried in tanks on the busses connected directly with the carburetors. As an excise tax on the privilege of use, the facts bring it squarely within the much distinguished but still unreversed doctrine of Helson and Randolph v. Kentucky, 279 U. S. 245.

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[1] We take note of the fact that occasionally gasoline was bought in the state and the tax paid thereon without contest. This case, save for the administrative provisions noticed later, is concerned only with gasoline used from tanks on the busses for propulsion.

However, unlike the ferry boats in the Helson case and the airplanes and railroad motors in the other cited cases, plaintiff does use the state owned highways, and the state has ample power to exact a reasonable charge for that use even of purely interstate carriers. The right to carry on interstate commerce gives plaintiff no right to use state highways or park in the state house grounds as a garage, [fol. 48] without paying a fair charge therefor. Clark v. Poor, 274 U. S. 554; Carley & Hamilton, Inc. v. Snook, 281 U. S. 66; Interstate Busses Corp. v. Blodgett, 276 U. S. 245; Continental Baking Co. v. Woodring, 286 U. S. 352. It is neither charged nor proven here that five cents a gallon is, together with the modest mileage charge laid by another statute, such an exorbitant charge as to be a tax disguised as compensation, nor that the method has no reasonable relation to the use made of the highways. We know that the heavier and faster the bus, the more damage it does to the highways, and in rough approximation, the more gasoline it uses. If the legislature, by this statute, exacted compensation for the use of the highways, plaintiff must fail.

But unless the statute can fairly be construed as a charge for the use of state facilitation, rather than an excise tax on the privilege of interstate commerce, then plaintiff must prevail. Interstate Transit, Inc. v. Lindsey, 283 U. S. 183. Free to construe this statute a prioi, the fact that the proceeds of the sales tax, and perhaps of the use tax, go exclusively to highway financing, would be most persuasive. Interstate Transit, Inc. v. Lindsey, supra. That a mileage tax is also imposed is not controlling. Interstate Busses Corp. v. Blodgett, supra. Practical considerations support such a construction, for these menacing mammoths of the highway ought to pay for the damage they do.

But we are not free. The New Mexico statute means what the New Mexico Supreme Court says it means. The predecessor of this statute, in language so nearly identical as to admit of no distinction, has been twice before the Supreme Court of New Mexico. In Breece Lumber Co. v. Mirabal, 287 Pac. 699, plaintiff was compelled to pay the tax on gasoline used in logging operations, none of which was used on the highways. The court specifically held it was a tax, as the statute says, and not compensation for the use [fol. 49] of the highways. Later, an airplane company, not using the highways, was compelled to pay the sales tax, but

not the use tax. Transcontinental Air Co. v. Lujan, supra. In 1931 the legislature exempted gasoline bought in large quantities and not used on the highways. This amendment was called to the attention of the Supreme Court on rehearing, in the last case, the claim being that the amendment disclosed a legislative intent to construe the statute as designed only for compensation for the use of the highways. But the Supreme Court said that the history of the statute warranted no such construction, adhered to its view that a tax was imposed and not compensation exacted, and the airplane company was required to pay the tax.

A decent respect for these opinions of the highest court of New Mexico seems to repel the conclusion that this statute exacts a charge for the use of highways but does not impose a tax. If it is a compensation statute, the airplane company should not have paid. It cannot be a tax for airplanes and a charge for busses. It is one or the other. True, it was the sales tax there involved, and not the use tax. But where the statute imposes "an excise tax upon sale and use," it is hair-splitting to say that "excise tax" means what it says with reference to "sale" and an entirely different thing with reference to "use" in the same breath.

Until the New Mexico statute is amended or the Supreme Court of New Mexico otherwise interprets it, the majority of the court defer to the decisions as they now exist. The presumption of constitutionality hardly justifies a federal court in refusing to follow state decisions construing state statutes.

That Texas rebates plaintiff taxes paid on gas purchased in Texas and used in New Mexico is a circumstance that bears on the rough justice of the situation, but does not [fol. 50] bear on the critical question of what the New Mexico legislature intended when it enacted this statute some years before the rebate was granted by another sovereignty.

We adopt the stipulated facts as our findings; a decree enjoining the collection of the tax will be prepared and entered. Administrative provisions of the statute, incidentally attacked, seem appropriate to the enforcement of the statute. They do not require plaintiff to do business in New Mexico. The decree will not enjoin administrative provisions appropriate to enforce the mileage tax statute, or the sales tax on such gasoline as plaintiff does buy in the state.

If defendant appeals within thirty days of the entry of the decree, a stay will be granted to the end that the bond now in force shall remain in force pending the appeal, to protect the defendant in event the decree is reversed.

We are indebted to counsel for their intelligent cooperation in agreeing upon the facts and in expediting a decision, and for very helpful argument and briefs.

Done at Santa Fe, New Mexico, this the 19th day of July, A. D. 1935.

Geo. T. McDermott, United States Circuit Judge.
Colin Neblett, United States District Judge.

IN UNITED STATES DISTRICT COURT

DISSENTING OPINION

BRATTON, Circuit Judge, dissenting:

The crucial question presented for determination is whether the tax involved represents a reasonable and nondiscriminatory excise upon the privilege of using the public [fol. 51] highways of New Mexico in the conduct of an interstate motorbus business or a levy upon the prerogative to engage in interstate commerce. If the former it is valid; if the latter it violates the commerce clause of the Constitution of the United States and must fall.

A sketchy chronology of the legislation in New Mexico may be helpful. Chapter 93, Laws of 1919, imposed a tax of two cents per gallon on all gasoline sold or used within the state and expressly provided that the proceeds derived therefrom, after payment of certain salaries and expenses, should be covered into the road fund to be used for the construction, improvement and maintenance of the public highways. Chapter 175, Laws of 1921, levied a tax upon gasoline sold but did not cover gasoline used and it repealed the earlier act in toto. That act was amended by Chapter 61, Laws of 1925, but it likewise did not include a tax on gasoline used. Chapter 20, Laws of 1927, being Secs. 60-203-205 Comp. 1929, dealt exclusively with sales and did not concern itself with use. Chapter 14 of the same session, laid a tax of five cents per gallon on gasoline used for the propulsion or operation of motor-busses, commercial cars, trucks or other vehicles upon the highways. It was amended by

Chapter 29, Laws of 1929, being Sec. 60-101 Comp. 1929, to extend the tax to gasoline used for any purpose. The amending act reads:

"There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this state *for any purpose;* provided that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this state by distributors or dealers upon the sale of the gasoline so used."

[fol. 52] Chapter 31, Laws of 1931, authorized a refund of the tax collected upon gasoline purchased in specified quantities and used exclusively for other purposes than the operation of motor vehicles upon the public streets or highways of the state. That act was amended in certain particulars by Chapter 162, Laws of 1933, but the amendment has no significance here. It still authorizes a refund upon one hundred or more gallons of gasoline if acquired by single purchases of fifty gallons or more and is used otherwise than in the operation of vehicles on the streets or highways. That act was approved March 15, 1933. Then followed Chapter 176, Laws of 1933, approved the succeeding day. It defines a distributor, among other things, as being any person using or consuming gasoline within the state before it shall have been received by any other person there. Section 2 levies and imposes an excise tax of five cents per gallon upon the sale or use of gasoline sold or used within the state, except that sold in interstate commerce. Section 3 makes it unlawful for any distributor to use any motor fuel without procuring a license from the Comptroller. It further provides for the payment of a license fee of $25.00. Upon compliance with that section a license is issued which entitled the licensee to transact business in the state. Section 4 provides for the filing of a bond conditioned upon payment of any tax which may fall due and the making and filing of certain required reports, the amount of the bond to be double the estimated amount of the tax due for one month. Section 13 provides that the tax shall be distributed as then or thereafter provided by law.

No argument is presented with respect to the application of the funds derived from the tax on the sale and that on the use of gasoline. All parties assume that the funds derived from both sources are applied, first, to the discharge

of outstanding highway debentures and then to the construction, operation and maintenance of public highways. [fol. 53] The law has been uniformly administered in that manner and it, therefore, is unnecessary to turn aside for the purpose of considering whether there is any distinction between the uses to which the two classes of revenue may be devoted.

Plaintiff asserts that the exaction of the tax in question casts an undue burden upon interstate commerce. Its chief reliance to sustain that contention is placed upon Helson v. Kentucky, 279 U. S. 245. There the State of Kentucky attempted to impose a tax upon gasoline used in the operation of a ferry on the Ohio River. The ferry was engaged solely in the transportation of passengers between the States of Illinois and Kentucky. All of the gasoline was purchased in Illinois; seventy-five per cent of it was consumed in Kentucky and the tax was asserted only on that part of it. The court held that the tax was a direct burden on interstate commerce and therefore invalid. But that case is clearly distinguishable from this one. There no state facility was used in the operation of the business. Here, plaintiff uses and enjoys the public highways in the conduct of its business. They are constructed and maintained at great public expense. That heavy busses operated at high speed wear and tear highways thus increasing the expense of upkeep and repair is a recognized fact. It is now settled by repeated adjudications that a common carrier for hire, who uses the public highways in the conduct of its business may be required to contribute to their cost and upkeep, although it is engaged exclusively in interstate commerce. If reasonable and non-discriminatory, that contribution in the nature of compensation may be fixed upon the basis of an annual tax graduated according to the number and capacity of vehicles used, Clark v. Poor, 274 U. S. 554; it may be fixed by mileage, Interstate Busses Corp. v. Blodgett, 276 U. S. 245; it may be upon a per gross ton mileage, Continental Baking Co. v. Woodring, 286 U. S. 352, or [fol. 54] upon any other basis which sustains a direct relation to the wear and tear of the highways.

A careful analysis of the legislation in New Mexico indicates clearly that the tax now required, measured by the amount of gasoline used in the operation of motor vehicles upon the public highways, is in essence an excise in the na-

ture of compensation for the privilege of using the highways. The earlier act laid the tax upon gasoline used for any purpose. It was not confined to that consumed upon the highways and its validity was sustained. Breece Lbr. Co. v. Mirabal, 34 N. M. 643, 287 Pac. 699. But the legislature in 1931, that is at the next session following that decision, authorized refunds upon gasoline not used upon the highways. That chronology argues convincingly that the legislature intended to meet the decision of the court and correct an undesired situation by converting the tax into one of compensation for the privilege of using the highways. When considered in connection with the fact that the proceeds, above the amount required for administration, were allocated to highway purposes, it amounted to a legislative declaration to that effect. The objective could have been reached in either of two methods: enact a completely new statute levying the tax only upon gasoline used in vehicles on the highways, or allow the existing law making the levy general to remain in force and enact a special statute authorizing refunds. The former method would have entailed manifest administrative difficulties with much evasion of taxes. The latter presented plain advantages in its administration with less escape of taxes. That method was employed and it evinces a clear intent and purpose on the part of the legislature to require compensation for the privilege of using the highways—not the privilege of engaging in business. The fact that all of the revenue derived, except that required for administration, is allocated to highway [fol. 55] purposes lends strong support to that conclusion. Clark v. Poor, supra; Interstate Transit, Inc. v. Lindsey, 283 U. S. 183; State v. Johnson, — La. —, 138 So. 503.

Since the compensation thus required is measured by the quantity of gasoline consumed, it bears a direct and pertinent relation to the wear and tear of the highways and the method of computing it is not arbitrary. On the contrary, it is reasonable and free from discrimination in method and amount.

Neither Breece Lbr. Co. v. Mirabel, supra, nor Transcontinental & Western Air, Inc. v. Lujan, 36 N. M. 64, 8 Pac. (2d) 103, announces a doctrine contrary to anything which has been said. The former merely held that Chapter 29, Laws of 1929, imposed a tax upon all gasoline used within the state and consequently applied to that consumed in the

cutting, logging and processing of timber. Manifestly, that was correct. The statute under consideration levied the tax upon all gasoline used without exception, exclusion or limitation and its validity was sustained as an excise. That is the scope of that decision. The court held in the latter case that the tax upon gasoline purchased outside the state, but consumed within its boundaries in the operation of airplanes engaged in interstate commerce, could not be sustained because it constituted an excise upon the use of an instrumentality of interstate commerce. But there the planes did not use the highways. No use of a state facility was involved. The tax was wholly foreign to the cost and upkeep of the highways. It could find no other basis than impingement upon the use of an instrumentality in interstate commerce. The act of 1931 authorizing refunds was called to the attention of the court on rehearing in that case. But the tax involved there had accrued before that statute became effective. That fact is plain from the statement in [fol. 56] the opinion making disposition of the motion that the statute went into effect after the suit was filed. The contention advanced was that by the refunding statute, the legislature of 1931 attempted to construe the act of 1929 in such manner that its provisions did not apply to gasoline sold for use in interstate aircraft. The court responded with the statement that the history of gasoline tax legislation did not warrant that construction. The accuracy of that statement is evident. The legislature in 1927 passed an act levying the tax only upon gasoline used for operating vehicles on the highways. That act was amended at the next session to extend its application to all gasoline used in any manner. The amended statute quoted above was in force at the time the tax involved in the suit accrued. Manifestly, the act passed in 1931 providing for refunds could not reflect a legislative intent in 1929 to apply the tax only to gasoline used on the highways when the statute of 1929 itself expressly provided otherwise by amending a prior act to extend the tax to gasoline used for all purposes. That was the sole purpose of that amendment. The substance of the argument was that the legislature of 1929 intended one thing when it provided the opposite in clear and unmistakable language. Rejection of the contention occasions no surprise. But here we deal with the situation after 1931. That the legislature did not intend for the act of 1931 to

serve retroactively by exempting gasoline theretofore used otherwise than on the highways is beside the question. The pertinent inquiry is what prospective change did the act of 1931 effect. The language contained in the opinion on rehearing in that case has no bearing upon the problem with which we are confronted. Moreover, the statute of 1931 did not attempt to exempt any gasoline used from the payment of the tax at the time of its purchase. It merely authorized refunds in certain circumstances. That presupposes payment of the tax, rather than its exemption as [fol. 57] there contended by the taxpayer.

Of course, this court maintains a becoming respect for the decisions of the Supreme Court of the state. Its construction of the constitution and statutes of the state are binding upon this court. But that court has never held that the tax now authorized, measured by the quantity of gasoline consumed in the operation of motor vehicles on the highways, is an excise upon the privilege of engaging in business. When it has construed the statute in that manner, we should hold that the state is powerless to exact the tax from a company engaged exclusively in interstate commerce because it would violate the commerce clause of the Federal Constitution, but until then plaintiff should be required to pay it as reasonable and non-discriminatory compensation for the privilege of using the public highways of the state. For these reasons I dissent.

Sam G. Bratton, Circuit Judge.

[fol. 58] IN UNITED STATES DISTRICT COURT

DECREE OF INJUNCTION—Filed August 9, 1935

This cause came on for final hearing on the bill of complaint herein praying for a decree enjoining and restraining the defendants from enforcing or attempting to enforce the provisions of Chapter 176 of the Session Laws of 1933 of the State of New Mexico as against the plaintiff, insofar as the same relates to gasoline or other motor fuel purchased by plaintiff within other states than the State of New Mexico and placed or to be placed in its vehicles in other states than the State of New Mexico, and used in said vehicles for the propelling of the same in interstate com-

merce in, into and across the State of New Mexico; and the Judge of the above court having called to his assistance to hear and determine this cause, the Hon. George T. McDermott and the Hon. Sam G. Bratton, Judges of the Circuit Court of Appeals for the Tenth Circuit pursuant to Section 266 of the Judicial Code; and

The defendants having filed their answer and the parties hereto having stipulated the facts; and

Said cause having come on to be heard before said three Judges and the plaintiff appearing by Earl A. Bagby of Los Angeles, California, and E. R. Wright of Santa Fe, New Mexico, attorneys and solicitors for the plaintiff, and the defendants appearing by Frank H. Patton, Attorney General of the State of New Mexico, and J. R. Modrall and Quincy D. Adams, Assistant Attorneys General of the State of New Mexico, and the case having been fully argued and submitted,

It is ordered, adjudged and decreed by said Three-Judge Court that:

1. The threatened application by defendants as officers of the State of New Mexico of Chapter 176 of the Session Laws of 1933 of the State of New Mexico, to the plaintiff [fol. 59] herein so far as relates to gasoline or other motor fuel purchased by plaintiff within other states than the state of New Mexico, and placed or to be placed in its vehicles in other states than the State of New Mexico, and used in said vehicles for the propelling of the same in interstate commerce within the State of New Mexico is contrary to and prohibited by Art. 1, Sec. 8, Cl. 3 of the Constitution of the United States and is void and unenforceable against the plaintiff; to all of which the defendants except.

2. That a permanent injunction issue, enjoining and restraining the defendants John D. Bingaman, as Commissioner of Revenue of the State of New Mexico, Juan N. Vigil, as State Comptroller of the State of New Mexico, Frank H. Patton, as Attorney General of the State of New Mexico, Juanita Hill, as State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley, as Governor of the State of New Mexico, and each of them, their successors, agents, servants, employees and attorneys, and those in active concert or participating with them, from arresting or causing or authorizing the arrest of plaintiff, or its agents or em-

ployees, or otherwise preventing or interfering with plaintiff in its conduct of its operation of busses as a common carrier of passengers and property for compensation over the public highways of the State of New Mexico in interstate commerce, because of any alleged noncompliance with Chapter 176 of the Session Laws of 1933 of the State of New Mexico so far as relates to gasoline or other motor fuel purchased by plaintiff, within other states than the State of New Mexico, and placed or to be placed in its vehicles in other states than the State of New Mexico, and used in said vehicles for the propelling of the same in interstate commerce within the State of New Mexico; and from enforcing said statute in any other manner against this plaintiff or its predecessors in interest by reason of the [fol. 60] use of gasoline or other motor fuel within the State of New Mexico that shall have been or shall be acquired, or purchased and placed in vehicles outside of the State of New Mexico, and used as aforesaid. To all of which defendants except.

Done at Santa Fe, New Mexico, this the 2nd day of August, A. D. 1935.

Geo. T. McDermott, United States Circuit Judge.
Colin Neblett, United States District Judge.

Approved as to form: E. R. Wright, Solicitor for Plaintiff. J. R. Modrall, Asst. Attorney General.

[fol. 61] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed August 20, 1935

Comes now John D. Bingaman as Commissioner of Revenue of the State of New Mexico, Juan N. Vigil as State Comptroller of the State of New Mexico, Frank H. Patton as Attorney General of the State of New Mexico, Juanita Hill as State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley as Governor of the State of New Mexico, being all the defendants in the above entitled cause by and through their attorneys, Frank H. Patton, Attorney General of the State of New Mexico, and J. R. Modrall and Quincy D. Adams, Assistant Attorneys General of the State

of New Mexico, and conceiving themselves aggrieved by the decree entered in said cause on the 9th day of August, 1935, perpetually enjoining the said defendants and their agents, employees and servants from enforcing or attempting to enforce the provisions of Chapter 176 of the Session Laws of 1933 of the State of New Mexico against the above named plaintiff so far as relates to gasoline or other motor fuel purchased by plaintiff within other states than the State of New Mexico and placed in vehicles of the plaintiff in other states than the State of New Mexico and used in said vehicles for the propelling of same in interstate commerce within the State of New Mexico, pray an appeal may be allowed from said decree to the Supreme Court of the United States and in connection with this petition the said defendants herewith present their Assignment of Errors and Statement of Jurisdiction.

Dated this 15th day of August, A. D., 1935.

[fol. 62] Frank H. Patton, Attorney General; J. R. Modrall, Assist. Attorney General; Quincy D. Adams, Assist. Attorney General, Attorneys for Defendants.

The above appeal allowed this 15th day of August, A. D., 1935.

Colin Neblett, United States District Judge. Geo. T. McDermott, United States Circuit Judge. Sam G. Bratton, United States Circuit Judge.

Service of a copy of Petition for allowance of appeal acknowledged this 15th of August, 1935.

E. R. Wright, Attorney for Plaintiff.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed August 20, 1935

Comes now John D. Bingaman, as Commissioner of Revenue of the State of New Mexico; Juan N. Vigil, as State Comptroller of the State of New Mexico; Frank H. Patton, as Attorney General of the State of New Mexico; Juanita Hill, as State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley, as Governor of the State of

New Mexico, defendants below, appellants here in the above entitled cause, by and through their attorneys, Frank H. Patton, Attorney General of the State of New Mexico, and J. R. Modrall and Quincy D. Adams, Assistant Attorneys [fols. 63–75] General of the State of New Mexico, and in connection with their appeal make the following assignment of errors.

I

The Court erred in entering its decree of August 9, 1935, perpetually enjoining said defendants from enforcing or attempting to enforce the provisions of Chapter 176 of the Session Laws of 1933 of the State of New Mexico against the plaintiff insofar as the provisions of said law relate to gasoline or other motor fuel purchased by plaintiff within other states than the state of New Mexico and placed or to be placed in its vehicles in other states than the State of New Mexico and used in said vehicles for the propelling of the same in interstate commerce in, into and across the State of New Mexico.

Dated this 15th day of August, 1935.

Frank H. Patton, Attorney General; J. R. Modrall, Assistant Attorney General; Quincy D. Adams, Assistant Attorney General, Attorneys for Appellants.

Service of a copy of above assignments of error acknowledged this 15th day of August, 1935.

E. R. Wright, Attorney for Plaintiff.

[fol. 76] In United States District Court

Waiver of Citation

The issuance and service of the citation to appear in the Supreme Court of the United States in the above entitled case is hereby waived, and receipt of a copy of the præcipe for the record is hereby acknowledged this 15 day of Aug. 1935.

E. R. Wright, Attorney for Plaintiff.

[fol. 77] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 78] IN SUPREME COURT OF THE UNITED STATES

APPELLANTS' STATEMENT OF POINTS RELIED ON AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed Oct. 19, 1935

Based upon the Assignment of Errors heretofore filed in the above entitled cause, the appellants hereby state that they intend to rely on the following points, namely:

I

The threatened application of Chapter 176 of the Session Laws of 1933 of the State of New Mexico to the appellee, [fol. 79] so far as the same relates to gasoline or other motor fuel purchased by appellee outside of New Mexico and used in appellee's vehicles in New Mexico to propel the same in interstate commerce, is not contrary to nor prohibited by Article 1, Section 8, Clause 3 of the Constitution of the United States, because:

(a) When considered in conjunction with Chapter 31, Session Laws of New Mexico for 1931, said Chapter 176 constitutes merely a compensatory and regulatory exaction for the use of the public highways of the State of New Mexico.

(b) Even if said Chapter 176 should be construed as applied to appellee as an excise tax upon the use of gasoline in interstate commerce, it is justifiable as a compensatory and regulatory exaction for the use of state facilities.

(c) The Supreme Court of New Mexico has not construed said Chapter 176, Laws of 1933, in conjunction with Chapter 31, Laws of 1931, so that its application to appellee will be a violation of Article 1, Section 8, Clause 3 of the Constitution of the United States, and

(d) The characterization of Chapter 176, Laws of 1933, by the Supreme Court of New Mexico is not binding upon the Supreme Court of the United States where the question

involved is one of deprivation of rights secured by the Federal Constitution.

II

The appellants hereby designate the following portions of the record which they think necessary for the considera-
[fol. 80] tion of the points above stated:

(1) Bill of Complaint.
(2) Answer of Defendants.
(3) Stipulation of Facts.
(4) Decree of Injunction.
(5) Majority Opinion of the Court.
(6) Dissenting Opinion of Circuit Judge Sam G. Bratton.
(7) Petition for Appeal and Order Allowing Same.
(8) Assignment of Errors.
(9) Waiver of Citation.
(10) Appellants' Statement of Jurisdiction.
(11) Aoknowledgment of Service of Jurisdiction.
(12) Statement of Appellee in Opposition to Jurisdiction.
(13) Motion to Affirm.

Items Nos. 10, 11, 12 and 13 are hereby designated for printing in accordance with Paragraph 5 of Rule 12 of the Rules of the Supreme Court of the United States.

Frank H. Patton, Attorney General of the State of New Mexico, Santa Fe, New Mexico, Attorney for Appellants.

Service acknowledged this 15th day of October, 1935.

E. R. Wright, by Donovan N. Hoover, Counsel for Appellee, Santa Fe, New Mexico.

[fol. 81] [File endorsement omitted.]

Endorsed on cover: File No. 40,074. New Mexico D. C. U. S. Term No. 520. John D. Bingaman, as Commissioner of Revenue of the State of New Mexico, et al, appellants, vs. Golden Eagle Western Lines, Inc. Filed October 16, 1935. Term No. 520, O. T., 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 520

JOHN D. BINGAMAN, AS COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO, ET AL.,

Appellants,

vs.

GOLDEN EAGLE WESTERN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

STATEMENT AS TO JURISDICTION.

FRANK H. PATTON,
Attorney General of New Mexico.
J. R. MODRALL,
QUINCY D. ADAMS,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 520

JOHN D. BINGAMAN, AS COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO, ET AL.,

Appellants,

vs.

GOLDEN EAGLE WESTERN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

STATEMENT OF JURISDICTION.

Filed August 20, 1935.

In compliance with Rule 12 of the Supreme Court of the United States, appellant submits herewith its statement showing the basis of the jurisdiction of this Court to entertain the appeal in the above entitled cause.

A.

Statutes.

This cause was tried before a statutory three-judge court and the statutory jurisdiction of this Court to review by

direct appeal the order or decree herein complained of is conferred by the Act of March 4, 1913, Chapter 160, 37 Stat. 1013; February 13, 1925, Chapter 229, Section 1, 43 Stat., 938; United States Code, Compact Edition, Title 28, Section 380 of the Judicial Code.

It is provided by the last paragraph of said section as follows:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

Dates of Order and Application for Appeal.

The decree of the District Court was entered on the 9th day of August, 1935, and a petition for appeal was filed August 15, 1935, and allowed on the same date.

C.

Nature of the Case.

The petition of complainant was one seeking to enjoin John D. Bingaman, as Commissioner of Revenue of the State of New Mexico; Juan N. Vigil, as State Comptroller of the State of New Mexico; Frank H. Patton, as Attorney General of the State of New Mexico; Juanita Hill, as State Gasoline Tax Collector of the State of New Mexico, and Clyde Tingley, as Governor of the State of New Mexico, from enforcing Chapter 176 of the Session Laws of 1933 of the State of New Mexico (including amendments thereto) against the plaintiff herein so far as relates to gasoline or other motor fuel purchased by plaintiff or to be purchased by plaintiff within other States than the State of New

Mexico and placed or to be placed in its vehicles in other States than the State of New Mexico and used in said vehicles for the propelling of the same in interstate commerce within the State of New Mexico. Said Chapter 176 of the Session Laws of 1933 purports to levy a State gasoline tax of five cents per gallon on all gasoline used in the State of New Mexico.

The defendants filed an answer to the complaint wherein a majority of the allegations of fact were admitted but raised the questions of law. A stipulation of facts to be considered by the court was entered into by all parties to the cause and was filed in the case. The cause was tried by the United States District Court at Santa Fe, New Mexico. The only question really involved in the case is whether or not the laws of the State of New Mexico levy a tax on gasoline bought by an interstate carrier outside of the State of New Mexico and placed in the vehicles of the interstate carrier outside of the State of New Mexico and used for the propulsion of said vehicles over the highways of the State of New Mexico.

The court took the cause under advisement and on the 9th day of August, 1935, entered its decree perpetually enjoining the defendants as heretofore set forth.

D.

Cases Sustaining Jurisdiction.

The following decisions are believed to sustain the jurisdiction of this Court on an appeal from a decree from a statutory three-judge court wherein the question involved is whether the State of New Mexico may levy a tax on gasoline bought outside of the State of New Mexico and placed in the tanks of vehicles owned and operated by an interstate carrier outside of the State of New Mexico but used in the

propulsion of said vehicles over the public highways of the State of New Mexico:

Clark v. *Poor* (Ohio 1927), 274 U. S. 534, 71 L. Ed. 1199.

Hendrick v. *Maryland*, 235 U. S. 610.

Interstate Transit Company v. *Lindsey*, 283 U. S. 183, 75 L. Ed. 953.

Interstate Busses Corporation v. *Blodgett*, 278 U. S. 245, 72 L. Ed. 551.

Varney Air Lines v. *Babcock*, 1 Fed. Sup. 687.

Respectfully submitted,

FRANK H. PATTON,
Attorney General;
J. R. MODRALL,
Assistant Attorney General,
QUINCY D. ADAMS,
Assistant Attorney General,
Attorneys for Appellants.

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FILED

OCT 19 1935

CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

BRIEF OF APPELLANT OPPOSING APPELLEE'S MOTION TO AFFIRM AND APPELLEE'S STATEMENT IN OPPOSITION TO THE JURISDICTION OF THE COURT

GOLDEN EAGLE WESTERN LINES, INC., a corporation,

Appellee,

vs.

JOHN D. BINGAMAN, as Commissioner of Revenue of the State of New Mexico; JUAN N. VIGIL, as State Comptroller of the State of New Mexico; FRANK H. PATTON, as Attorney General of the State of New Mexico; JUANITA HILL, as State Gasoline Tax Collector of the State of New Mexico, and CLYDE TINGLEY, as Governor of the State of New Mexico,

Appellants.

No. 520

EQUITY

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SANTA FE NEW MEXICAN PUB. CORP., SANTA FE, N. M.

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Helson and Randolph vs. Kentucky, 279 U. S. 245 5

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43 Stat. 938, Ch. 229, Sec. 1 3

Ch. 176, Sec. 2, Laws of 1933 5

Ch. 31, Sec. 1, Laws of 1931 6

New Mexico Statutes Annotated, 1929 Compilation, Sec. 60-205 6

U. S. C., Title 28, Sec. 380 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

BRIEF OF APPELLANT OPPOSING APPELLEE'S MOTION TO AFFIRM AND APPELLEE'S STATEMENT IN OPPOSITION TO THE JURISDICTION OF THE COURT

GOLDEN EAGLE WESTERN LINES, INC., a corporation,

Appellee,

vs.

JOHN D. BINGAMAN, as Commissioner of Revenue of the State of New Mexico; JUAN N. VIGIL, as State Comptroller of the State of New Mexico; FRANK H. PATTON, as Attorney General of the State of New Mexico; JUANITA HILL, as State Gasoline Tax Collector of the State of New Mexico, and CLYDE TINGLEY, as Governor of the State of New Mexico,

Appellants.

No. _____

EQUITY

STATEMENT OF THE CASE

Appellee, Golden Eagle Western Lines, Inc., a corporation foreign to the State of New Mexico and not qualified to do business therein, filed its Bill of Complaint in the District Court of the United States for the District of New Mexico seeking to restrain appellants from collecting a

state tax of five cents (5c) per gallon on gasoline purchased by appellee outside of the State of New Mexico but used in appellee's motor busses to propel them over the public highways of the State of New Mexico. Appellee, in so far as its operations in New Mexico are concerned, is engaged only in interstate passenger bus operations. An interlocutory injunction was granted appellee after a hearing of the statutory three judge Court. Upon final hearing, the interlocutory injunction was made permanent. From the permanent injunction appellants have appealed to the Supreme Court of the United States. Appellee has filed a statement in opposition to the jurisdiction of the Supreme Court of the United States together with a motion to affirm as provided by Paragraph 3 of Rule 12 of the rules of the Supreme Court of the United States. This brief opposes the statement in opposition to the jurisdiction of the Court and the motion to affirm.

The return day on this appeal has not passed and the record has not been filed nor the case docketed in the Supreme Court at the time of the preparation of this brief. No reference can be made here to specific pages in the printed record.

The opinion of the statutory three judge District Court in this case has not as yet been reported. The Honorable Sam G. Bratton, Circuit Judge of the United States Circuit Court of Appeals for the Tenth District, who was one of the three judges who heard this case in the lower court, dissented from the majority members of the Court and both the majority and dissenting opinions are set out in full herein as Appendix "A".

SUMMARY OF POINTS INVOLVED

I

DOES THE SUPREME COURT OF THE UNITED STATES HAVE JURISDICTION IN THIS APPEAL?

II

SHOULD THE SUMMARY MOTION TO AFFIRM BE SUSTAINED?

ARGUMENTS AND AUTHORITIES

I

DOES THE SUPREME COURT OF THE UNITED STATES HAVE JURISDICTION IN THIS APPEAL?

As set forth in appellant's statement of jurisdiction filed herein pursuant to Rule 12, as amended, of the Rules of the Supreme Court of the United States, the jurisdiction of the Supreme Court to determine this appeal is conferred by the Act of March 4, 1913, Chapter 160, 37 Stat. 1013; February 13, 1925, Chapter 229, Section 1, 43 Stat. 938; United States Code, Compact Edition, Title 28, Section 380 of the Judicial Code. The last paragraph of said secti provides:

> "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the District Court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

Appellee's statement in opposition to the jurisdiction of this Court merely sets out more in detail the New Mexico Statutes involved in the case and advances appellee's argument in support of its position. It does not seriously oppose or question the jurisdiction of the Supreme Court to determine the matter. We believe that the only matter to be determined on the statement in opposition to the jurisdiction of the Court is as the name indicates, whether or not the Supreme Court has jurisdiction of the appeal. It is not a question in our mind of the correctness of the decision of the lower Court. This, of course, would be deter-

mined upon presentation of the whole record and briefs in chief to the Court. We submit that there can be no question as to the jurisdiction of the Court in this appeal.

II

SHOULD THE SUMMARY MOTION TO AFFIRM BE SUSTAINED?

It is to be noted that the motion to affirm the judgment of the lower Court is not based upon any jurisdictional grounds. The only other grounds upon which such a motion might be based are those set forth in Paragraph 4 of Rule 7 of the Rules of the Supreme Court of the United States, to-wit, that it is manifest that the appeal was taken for delay only or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

There is certainly no intimation that this appeal is taken for delay only. The questions for determination can hardly be termed so unsubstantial as to require no further argument in view of the two to one decision by the lower Court (see the opinions of the lower Court in Appendix "A").

The motion to affirm is based upon two grounds:

(1) That it appears from the pleadings and stipulated facts that the challenged statutes impose an excise tax on the privilege of engaging in interstate commerce.

(2) That the challenged statutes having been construed by the Supreme Court of the State of New Mexico as imposing an excise tax on the use of gasoline, and not as compensation for the use of a state facility, to-wit: the state highways of the State of New Mexico, the said Courts are bound by the construction placed upon the act by the State Supreme Court and must follow such construction.

We challenge the correctness of the statement in the first ground of the motion but the Court must necessarily examine all of the pleadings and stipulations in the record in order to determine this point. It should not be disposed of upon the summary motion to affirm. We deny that the

tax in question is in fact an excise tax on the privilege of engaging in interstate commerce but contend that its practical operation and effect is a tax for the use of state facilities, to-wit, the state highways of New Mexico measured by the number of gallons of gasoline used thereon. The case is not in any way controlled by Helson and Randolph vs. Kentucky, 279 U. S. 245, for the reason that in the Helson case there was no question as to the use of state facilities involved. We believe that the principle should be invoked that the state may levy a reasonable charge for the use of its facilities. Clark vs. Poor, 274 U. S. 554; Carley and Hamilton, Inc., vs. Snook, 281 U. S. 66; Interstate Busses Corporation vs. Blodgett, 276 U. S. 245; Interstate Transit, Inc., vs. Lindsey, 283 U. S. 183; Continental Baking Company vs. Woodring, 286 U. S. 352; Hendrick vs. Maryland, 235 U. S. 61; Kane vs. New Jersey, 242 U. S. 159; State vs. Johnson, 138 South. 503.

The five cents (5c) state tax in question is levied under the provisions of Section 2 of Chapter 176 of the Laws of 1933, which provides as follows:

> "Sec. 2. Five Cents (5c) Per Gallon Excise Tax. There is hereby levied and imposed an excise tax of five cents (5c) per gallon upon the sale and use of all gasoline and motor fuel sold or used in this state for any purpose except gasoline sold in interstate commerce, Provided, that this tax shall be collected only once upon any particular motor fuel, and where the excise tax has been paid in this state by distributors or dealers upon the sale a like tax shall not be collected for the use of the same motor fuel; Provided, that nothing in this Act shall prohibit any incorporated municipality from assessing and collecting the tax provided for in Chapter 159 of the 1931 Session Laws."

The wording of the above Act is identical with Section 60-101, New Mexico Statutes Annotated, Compilation of 1929, which was effective until the adoption of the 1933 law. These Acts imposed the tax upon all gasoline sold or used in this state whether used upon the highways

or not. Chapter 31 of the New Mexico Session Laws of 1931, which is entitled "AN ACT TO PROVIDE FOR REFUNDING THE EXCISE TAXES PAID ON GASOLINE OR MOTOR FUEL PURCHASED AND USED BY CONSUMER OTHER THAN IN MOTOR VEHICLES OPERATED OR INTENDED TO BE OPERATED ON ANY OF THE PUBLIC STREETS OR HIGHWAYS OF THE STATE OF NEW MEXICO;", provides as follows:

> "Section 1. That every person, firm, partnership, corporation or association having paid for any one purchase, the excise tax to a distributor or wholesaler upon fifty-six (56) or more gallons of gasoline or motor fuel, which gasoline or motor fuel was purchased and used solely and exclusively by such person, firm, partnership, corporation or association other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico, shall be entitled to a refund equal to the amount of tax so paid, upon compliance with the provisions of this act, and not otherwise."

This statute was in effect during all the time involved in this suit. Section 2 of Chapter 20 of the Laws of 1927, also quoted as Section 60-205, New Mexico Statutes Annotated, Compilation of 1929, provides for the distribution and use of said gasoline tax as follows:

> "The proceeds of said tax, except such portion thereof as may be necessary to pay the principal and interest of debentures issued hereunder, shall be paid into the state treasury and covered into the state road fund to be used for maintenance, construction and improvement of state highways and to meet the provisions of the federal aid road law." (Balance of statute immaterial on this point.)

This law is still in force and was in force during all the period herein involved.

We submit that when these statutes are considered and construed together, it evidences an intent on the part of the Legislature to levy a tax for the compensation for the use of state highways, measured by the number of gallons of gasoline used thereon.

As to the second ground of the motion to affirm, we do not believe that it should be disposed of upon this motion but rather upon a final hearing on this appeal. But briefly considering it, we submit first, that the New Mexico Courts in the cases referred to in appellee's statement in opposition to jurisdiction of the Court have failed to interpret the statutes in the manner contended for by appellee. The history of the New Mexico gasoline tax laws and a thorough discussion of the New Mexico cases involving them are set forth in the dissenting opinion of Judge Bratton, which is set out in the Appendix. We refer to this opinion as stating our position in the matter. The form of any tax is to be determined by its practical operation and effect and not by the name given it by the Legislature and therefore we do not concede that the New Mexico Court has construed the tax in question, together with the refunding statute, as purely an excise tax for the use of gasoline. We submit that where the question as to whether a state tax deprives a party of rights secured by the Federal Constitution is involved, the Supreme Court of the United States is not bound by its construction or characterization by a state Court. American Manufacturing Company vs. St. Louis, 250 U. S. 459; St. Louis & Southwestern Railway Company vs. Arkansas, 235 U. S. 350; Mountain Timber Company vs. Washington, 243 U. S. 219; Crew Levick Company vs. Pennsylvania, 245 U. S. 292; Williams vs. Massachusetts, 170 U. S. 213; Smith vs. St. Louis and Southwestern Railway, 181 U. S. 248; Western Union Telegraph Company vs. Kane, 216 U. S. 148; Sioux Remedy Company vs. Cope, 235 U. S. 197.

CONCLUSION

We have not felt it necessary to go into detailed argument in this preliminary brief nor to make an assignment of errors and cite full authorities as will be necessary in our brief in chief in this case. We respectfully submit that the motion to affirm be denied and that the case be heard upon the record and further briefs to be filed by the parties.

Respectfully submitted,

FRANK H. PATTON,
Attorney General.
Santa Fe, New Mexico.

J. R. MODRALL,
Assistant Attorney General.
Santa Fe, New Mexico.

QUINCY D. ADAMS,
Assistant Attorney General.
Santa Fe, New Mexico.

Attorneys for Appellants.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF NEW MEXICO

GOLDEN EAGLE WESTERN LINES, INC., a corporation,
Plaintiff,

vs.

JOHN D. BINGAMAN, as Commissioner of Revenue of the State of New Mexico; JUAN N. VIGIL, as State Comptroller of of the State of New Mexico; FRANK H. PATTON, as Attorney General of the State of New Mexico; JUANITA HILL, as State Gasoline Tax Collector of the State of New Mexico, and CLYDE TINGLEY, as Governor of the State of New Mexico.
Defendants.

Number 2765

-Equity-

Before McDERMOTT and BRATTON, Circuit Judges, and NEBLETT, District Judge.

PER CURIAM:

By Section 2, Chapter 176, Laws of 1933, the New Mexico legislature "levied and imposed an excise tax of five cents (5c) per gallon upon the sale and use of all gasoline and motor fuel sold or used in this state for any purpose except gasoline sold in interstate commerce, * * * "

Plaintiff operates a bus line through New Mexico, doing no intrastate business. It buys no gasoline in the State,* Transcontinental Air Co. v. Lujan, 8 Pac. (2d) 103, nor does it store gasoline in the state, American Airways, Inc. v. Wallace, 57 F. (2d) 877, affd. 287 U. S. 565; Nashville C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249; American Airways, Inc. v. Grosjean, 3 F. Supp. 995, affd. 290 U. S.

*—We take note of the fact that occasionally gasoline was bought in the state and the tax paid thereon without contest. This case, save for the administrative provisions noticed later, is concerned only with gasoline used from tanks on the busses for propulsion.

596; Edelman v. Boeing Air Transport, Inc., 289 U. S. 249. The only use in the state to which plaintiff puts its gasoline is in propelling its busses, the gasoline being carried in tanks on the busses connected directly with the carburetors. As an excise tax on the privilege of use, the facts bring it squarely within the much distinguished but still unreversed doctrine of Helson and Randolph v. Kentucky, 279 U. S. 245.

However, unlike the ferry boats in the Helson case and the airplanes and railroad motors in the other cited cases, plaintiff does use the state owned highways, and the state has ample power to exact a reasonable charge for that use even of purely interstate carriers. The right to carry on interstate commerce gives plaintiff no right to use state highways or parks or the state house grounds as a garage, without paying a fair charge therefor. Clark v. Poor, 274 U. S. 554; Carley & Hamilton, Inc. v. Snook, 281 U. S. 66; Interstate Busses Corp. v. Blodgett, 276 U. S. 245; Continental Baking Co. v. Woodring, 286 U. S. 352. It is neither charged nor proven here that five cents a gallon is, together with the modest mileage charge laid by another statute, such an exorbitant charge as to be a tax disguised as compensation, nor that the method has no reasonable relation to the use made for the highways. We know that the heavier and faster the bus, the more damage it does to the highways, and in rough approximation, the more gasoline it uses. If the legislature, by this statute, exacted compensation for the use of the highways, plaintiff must fail.

But unless the statute can fairly be construed as a charge for the use of state facilitation, rather than an excise tax on the privilege of interstate commerce, then plaintiff must prevail. Interstate Transit, Inc. v. Lindsey, 283 U. S. 183. Free to construe this statute *a priori*, the fact that the proceeds of the sales tax, and perhaps of the use tax, go exclusively to highway financing, would be most persuasive. Interstate Transit, Inc. v. Lindsey, supra. That a mileage tax is also imposed is not controlling. Interstate Busses Corp. v. Blodgett, supra. Practical con-

siderations support such a construction, for these menacing mammoths of the highways ought to pay for the damage they do.

But we are not free. The New Mexico statute means what the New Mexico Supreme Court says it means. The predecessor of this statute, in language so nearly identical as to admit of no distinction, has been twice before the Supreme Court of New Mexico. In Breece Lumber Co. v. Mirabal, 287 Pac. 699, plaintiff was compelled to pay the tax on gasoline used in logging operations, none of which was used on the highways. The court specifically held it was a tax, as the statute says, and not compensation for the use of the highways. Later, an airplane company, not using the highways, was compelled to pay the sales tax, but not the use tax. Transcontinental Air Co. v. Lujan, supra. In 1931 the legislature exempted gasoline bought in large quantities and not used on the highways. This amendment was called to the attention of the Supreme Court on re-hearing, in the last case, the claim being that the amendment disclosed a legislative intent to construe the statute as designed only for compensation for the use of the highways. But the Supreme Court said that the history of the statute warranted no such construction, adhered to its view that a tax was imposed and not compensation exacted, and the airplane company was required to pay the tax.

A decent respect for these opinions of the highest court of New Mexico seems to repel the conclusion that this statute exacts a charge for the use of highways but does not impose a tax. If it is a compensation statute, the airplane company should not have paid. It cannot be a tax for airplanes and charge for busses. It is one or the other. True, it was the sales tax there involved, and not the use tax. But where the statute imposed "an excise tax upon sale and use," it is hair-splitting to say that "excise tax" means what it says with reference to "sale" and an entirely different thing with reference to "use" in the same breath.

Until the New Mexico statute is amended or the Supreme Court of New Mexico otherwise interprets it, the majority of the court defer to the decisions as they now

exist. The presumption of constitutionality hardly justifies a federal court in refusing to follow state decisions construing state statutes.

That Texas rebates plaintiff taxes paid on gas purchased in Texas and used in New Mexico is a circumstance that bears on the rough justice of the situation, but it does not bear on the critical question of what the New Mexico legislature intended when it enacted this statute some years before the rebate was granted by another sovereignty.

We adopt the stipulated facts as our findings; a decree enjoining the collection of the tax will be prepared and entered. Administrative provisions of the statute, incidentally attacked, seem appropriate to the enforcement of the statute. They do not require plaintiff to do business in New Mexico. The decree will not enjoin administrative provisions appropriate to enforce the mileage tax statute, or the sales tax on such gasoline as plaintiff does buy in the state. If defendant appeals within thirty days of the entry of the decree, a stay will be granted to the end that the bond now in force shall remain in force pending the appeal, to protect the defendant in event the decree is reversed.

We are indebted to counsel for their intelligent cooperation in agreeing upon the facts and in expediting a decision, and for very helpful argument and briefs.

Done at Santa Fe, New Mexico, this the 19th day of July, A. D. 1935.

(Signed) GEO. T. McDERMOTT,
United States Circuit Judge.

(Signed) COLIN NEBLETT,
United States District Judge.

BRATTON, Circuit Judge, dissenting.

The crucial question presented for determination is whether the tax involved represents a reasonable and nondiscriminatory excise upon the privilege of using the public highways of New Mexico in the conduct of an interstate

motorbus business or a levy upon the prerogative to engage in interstate commerce. If the former it is valid; if the latter it violates the commerce clause of the Constitution of the United States and must fall.

A sketchy chronology of the legislation in New Mexico may be helpful. Chapter 93, Laws of 1919, impose a tax of two cents per gallon on all gasoline sold or used within the state and expressly provided that the proceeds derived therefrom, after payment of certain salaries and expenses, should be covered into the road fund to be used for the construction, improvement and maintenance of the public highways. Chapter 175, Laws of 1921, levied a tax upon gasoline sold but did not cover gasoline used and it repealed the earlier act in toto. That act was amended by Chapter 61, Laws of 1925, but it likewise did not include a tax on gasoline used. Chapter 20, Laws of 1927, being Secs. 60-203-205 Comp. of 1929, dealt exclusively with sales and did not concern itself with use. Chapter 14 of the same session, laid a tax of five cents per gallon on gasoline used for the propulsion or operation of motor busses, commercial cars, trucks or other vehicles upon the highways. It was amended by Chapter 29, Laws of 1929, being Sec. 60-101 Comp. of 1929, to extend the tax to gasoline used for any purpose. The amending act reads:

> "There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this state *for any purpose;* provided that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this state by distributors or dealers upon the sale of the gasoline so used."

Chapter 31, Laws of 1931, authorized a refund of the tax collected upon gasoline purchased in specified quantities and used exclusively for other purposes than the operation of motor vehicles upon the public streets or highways of the state. That act was amended in certain particulars by Chapter 162, Laws of 1933, but the amendment has no significance here. It still authorizes a refund upon one hun-

dred or more gallons of gasoline if acquired by single purchases of fifty gallons or more and is used otherwise than in the operation of vehicles on the streets or highways. That act was approved March 15, 1933. Then followed Chapter 176, Laws of 1933, approved the succeeding day. It defines a distributor, among other things, as being any person using or consuming gasoline within the state before it shall have been received by any other person there. Section 2 levies and imposes an excise tax of five cents per gallon upon the sale or use of gasoline sold or used within the state, except that sold in interstate commerce. Section 3 makes it unlawful for any distributor to use any motor fuel without procuring a license from the Comptroller. It further provides for the payment of a license fee of $25.00. Upon compliance with that section a license is issued which entitles the licensee to transact business in the state. Section 4 provides for the filing of a bond conditioned upon payment of any tax which may fall due and the making and filing of certain required reports, the amount of the bond to be double the estimated amount of the tax due for one month. Section 13 provides that the tax shall be distributed as then or thereafter provided by law.

No argument is presented with respect to the application of the funds derived from the tax on the sale and that on the use of gasoline. All parties assume that the funds derived from both sources are applied, first, to the discharge of outstanding highway debentures and then to the construction, operation and maintenance of public highways. The law has been uniformly administered in that manner and it, therefore, is unnecessary to turn aside for the purpose of considering whether there is any distinction between the uses to which the two classes of revenue may be devoted.

Plaintiff asserts that the exaction of the tax in question casts an undue burden upon interstate commerce. Its chief reliance to sustain that contention is placed upon Helson v. Kentucky, 279 U. S. 245. There the State of Kentucky attempted to impose a tax upon gasoline used in the operation of a ferry on the Ohio River. The ferry was engaged solely in the transportation of passengers between the

States of Illinois and Kentucky. All of the gasoline was purchased in Illinois; seventy-five per cent of it was consumed in Kentucky and the tax was asserted only on that part of it. The court held that the tax was a direct burden on interstate commerce and therefore invalid. But that case is clearly distinguishable from this one. There no state facility was used in the operation of the business. Here, plaintiff uses and enjoys the public highways in the conduct of its business. They are constructed and maintained at great public expense. That heavy busses operated at high speed wear and tear highways thus increasing the expense of upkeep and repair is a recognized fact. It is now settled by repeated adjudications that a common carrier for hire, who uses the public highways in the conduct of its business may be required to contribute to their cost and upkeep, although it is engaged exclusively in interstate commerce. If reasonable and nondiscriminatory, that contribution in the nature of compensation may be fixed upon the basis of an annual tax graduated according to the number and capacity of vehicles used, Clark v. Poor, 274 U. S. 554; it may be fixed by mileage, Interstate Busses Corp. v. Blodgett, 276 U. S. 245; it may be upon a per gross ton mileage, Continental Baking Co. v. Woodring, 286 U. S. 352, or upon any other basis which sustains a direct relation to the wear and tear of the highways.

A careful analysis of the legislation in New Mexico indicates clearly that the tax now required, measured by the amount of gasoline used in the operation of motor vehicles upon the public highways, is in essence an excise in the nature of compensation for the privilege of using the highways. The earlier act laid the tax upon gasoline used for any purpose. It was not confined to that consumed upon the highways and its validity was sustained. Breece Lbr. Co. v. Mirabal, 34 N. M. 643, 287 Pac. 699. But the legislature of 1931, that is at the next session following that decision, authorized refunds upon gasoline not used upon the highways. That chronology argues convincingly that the legislature intended to meet the decision of the court and correct an undesired situation by converting the tax into one of compensation for the privilege of using the highways.

When considered in connection with the fact that the proceeds, above the amount required for administration, were allocated to highway purposes, it amounted to a legislative declaration to that effect. The objective could have been reached in either of two methods: enact a completely new statute levying the tax upon only gasoline used in vehicles on the highways, or allow the existing law making the levy general to remain in force and enact a special statute authorizing refunds. The former method would have entailed manifest administrative difficulties with much evasion of taxes. The latter presented plain advantages in its administration with less escape of taxes. That method was employed and it evinces a clear intent and purpose on the part of the legislature to require compensation for the privilege of using the highways—not the privilege of engaging in business. The fact that all of the revenue derived, except that required for administration, is allocated to highway purposes lends strong support to that conclusion. Clark v. Poor, supra; Interstate Transit, Inc. v. Lindsey, 283 U. S. 183; State v. Johnson,..... La. ....., 138 So. 503.

Since the compensation thus required is measured by the quantity of gasoline consumed, it bears a direct and pertinent relation to the wear and tear of the highways and the method of computing it is not arbitrary. On the contrary, it is reasonable and free from discrimination in method and amount.

Neither Breece Lbr. Co. v. Mirabal, supra, nor Transcontinental & Western Air, Inc. v. Lujan, 36 N. M. 64, 8 Pac. (2d) 103, announces a doctrine contrary to anything which has been said. The former merely held that Chapter 29, Laws of 1929, imposed a tax upon all gasoline used within the state and consequently applied to that consumed in the cutting, logging and processing of timber. Manifestly, that was correct. The statute under consideration levied the tax upon all gasoline used without exception, exclusion or limitation and its validity was sustained as an excise. That is the scope of that decision. The court held in the latter case that the tax upon gasoline purchased outside the state, but consumed within its boundaries in the operation of airplanes engaged in interstate commerce,

could not be sustained because it constituted an excise upon the use of an instrumentality of interstate commerce. But there the planes did not use the highways. No use of a state facility was involved. The tax was wholly foreign to the cost and upkeep of the highways. It could find no other basis than impingement upon the use of an instrumentality in interstate commerce. The act of 1931 authorizing refunds was called to the attention of the court on rehearing in that case. But the tax involved there had accrued before the statute became effective. That fact is plain from the statement in the opinion making disposition of the motion that the statute went into effect after the suit was filed. The contention advanced was that by the refunding statute, the legislature of 1931 attempted to *construe* the act of 1929 in such manner that its provisions did not apply to gasoline sold for use in interstate aircraft. The court responded with the statement that the history of gasoline tax legislation did not warrant that construction. The accuracy of that statement is evident. The legislature in 1927 passed an act levying the tax only upon gasoline used for operating vehicles on the highways. That act was amended at the next session to extend its application to all gasoline used in any manner. The amended statute quoted above was in force at the time the tax involved in the suit accrued. Manifestly, the act passed in 1931 providing for refunds could not reflect a legislative intent in 1929 to apply the tax only to gasoline used on the highways when the statute of 1929 itself expressly provided otherwise by amending a prior act to extend the tax to gasoline used for all purposes. That was the sole purpose of that amendment. The substance of the argument was that the legislature of 1929 intended one thing when it provided the opposite in clear and unmistakable language. Rejection of the contention occasions no surprise. But here we deal with the situation after 1931. That the legislature did not intend for the act of 1931 to serve retroactively by exempting gasoline theretofore used otherwise than on the highways is beside the question. The pertinent inquiry is what prospective change did the act of 1931 effect. The language contained in the opinion on rehearing in that case has

no bearing upon the problem with which we are confronted. Moreover, the statute of 1931 did not attempt to exempt any gasoline used from the payment of the tax at the time of its purchase. It merely authorized refunds in certain circumstances. That presupposes payment of the tax, rather than its exemption as there contended by the taxpayer.

Of course, this court maintains a becoming respect for the decisions of the Supreme Court of the state. Its construction of the constitution and statutes of the state are binding upon this court. But that court has never held that the tax now authorized, measured by the quantity of gasoline consumed in the operation of motor vehicles on the highways, is an excise upon the privilege of engaging in business. When it has construed the statute in that manner, we should hold that the state is powerless to exact the tax from a company engaged exclusively in interstate commerce because it would violate the commerce clause of the Federal Constitution, but until then plaintiff should be required to pay it as reasonable and non-discriminatory compensation for the privilege of using the public highways of the state. For these reasons I dissent.

(Signed) SAM BRATTON,
Circuit Judge.

FILED
JAN 21 1936

IN THE

Supreme Court of the United States

October Term, 1935

GOLDEN EAGLE WESTERN LINES, INC., a corporation,

Appellee,

vs.

JOHN D. BINGAMAN, as Commissioner of Revenue of the State of New Mexico; JUAN N. VIGIL, as State Comptroller of the State of New Mexico; FRANK H. PATTON, as Attorney General of the State of New Mexico; JUANITA HILL, as State Gasoline Tax Collector of the State of New Mexico, and CLYDE TINGLEY, as Governor of the State of New Mexico,

No. 520

Appellants.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

VALLIANT PRINTING CO., ALBUQUERQUE

INDEX AND SUMMARY OF ARGUMENT

Page

PRELIMINARY STATEMENT 1

STATEMENT OF THE FACTS 1

Appellee, Golden Eagle Western Lines, Inc., brought suit in the United States District Court of New Mexico against appellants, who are state officers of the State of New Mexico, seeking an interlocutory injunction to restrain appellants from collecting or attempting to collect a state gasoline tax on gasoline bought outside of the State of New Mexico but used in appellee's interstate motor busses over the highways of the State of New Mexico, said tax being claimed to be due under the provisions of Chapter 176 of the Session Laws of 1933. A stipulation of facts was entered into and upon final hearing before a statutory three judge district court a decree of injunction was granted appellee. From this final decree of injunction appellants prosecute this appeal.

QUESTION INVOLVED 2

Does Chapter 176 of the Session Laws of 1933 of the State of New Mexico, insofar as it attempts to levy a tax upon gasoline purchased outside of the State of New Mexico but used in interstate motor busses on the highways of the State of New Mexico, violate Article I, Section 8, Clause 3 of the Constitution of the United States?

PROPOSITION OF LAW 2

The threatened application of Chapter 176 of the Session Laws of 1933 of the State of New Mexico to the appellee, so far as the same relates to gasoline or other motor fuel purchased by appellee outside of New Mexico and used in appellee's vehicles in New Mexico to propel the same in interstate commerce, is not contrary to nor prohibited by Article 1, Section

8, Clause 3 of the Constitution of the United States, because:

(a) When considered in conjunction with Chapter 31, Session Laws of New Mexico for 1931, said Chapter 176 constitutes merely a compensatory and regulatory exaction for the use of the public highways of the State of New Mexico.

(b) Even if said Chapter 176 should be construed as applied to appellee as an excise tax upon the use of gasoline in interstate commerce, it is justifiable as a compensatory and regulatory exaction for the use of state facilities.

(c) The Supreme Court of New Mexico has not construed said Chapter 176, Laws of 1933, in conjunction with Chapter 31, Laws of 1931, so that its application to appellee will be a violation of Article 1, Section 8, Clause 3 of the Constitution of the United States, and

(d) The characterization of Chapter 176, Laws of 1933, by the Supreme Court of New Mexico is not binding upon the Supreme Court of the United States where the question involved is one of deprivation of rights secured by the Federal Constitution.

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I. When Considered in Conjunction With Chapter 31, Session Laws of New Mexico for 1931 and the Amendments Thereto, Said Chapter 176 Constitutes Merely a Compensatory and Regulatory Exaction for the Use of the Public Highways of the State of New Mexico 7

a. Although Chapter 176 purports to levy a tax of 5c per gallon on all gasoline used for any purposes within the state, Chapter 31 of the Session

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Laws of 1931 and the amendments thereto refund this tax on all gasoline not used in motor vehicles operated on the streets or highways of the State of New Mexico.

b. Except for a small amount used in the administration and collection of the gasoline tax, all the proceeds derived from the gasoline tax are allocated to highway purposes.

c. The state may exact of interstate commerce a reasonable and non-discriminatory charge for the use of state facilities.

II. The Supreme Court of New Mexico Has Not Construed Said Chapter 176, Laws of 1933, in Conjunction With Chapter 31, Laws of 1931, So That Its Application to Appellee Will Be a Violation of Article I, Section 8, Clause 3, of the Constitution of the United States 15

a. The Breece Lumber Company case was decided a year before the refunding act, Chapter 31 of the Laws of 1931, was enacted.

b. The Transcontinental & Western Air, Inc., case was instituted prior to the enactment of the refunding law, Chapter 31 of the Laws of 1931, and although the refunding act was mentioned by the Supreme Court in its opinion on rehearing, the facts before the Court did not warrant the consideration of the refunding statute.

c. The Supreme Court of the State of New Mexico has in neither of the cases mentioned construed the gasoline tax statutes in the manner held by the District Court below.

III. Even If Said Chapter 176 Should Be Construed as Applying to Appellee as an Excise Tax Upon the Use of Gasoline in Interstate Commerce, It Is Justifiable as a Compensatory and Regulatory Exaction for the Use of State Facilities 20

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a. A state may exact a reasonable non-discriminatory compensation of interstate commerce for the use of state facilities.

b. The situation here involved does not fall within the rule of Helson vs. Kentucky for the reason that the use of state facilities was not involved in the Helson case.

IV. The Characterization of Chapter 176, Laws of 1933, By the Supreme Court of New Mexico Is Not Binding Upon the Supreme Court of the United States Where the Question Involved Is One of Deprivation of Rights Secured by the Federal Constitution 24

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IN THE

Supreme Court of the United States

October Term, 1935

GOLDEN EAGLE WESTERN LINES, INC., a corporation,

Appellee,

vs.

JOHN D. BINGAMAN, as Commissioner of Revenue of the State of New Mexico; JUAN N. VIGIL, as State Comptroller of the State of New Mexico; FRANK H. PATTON, as Attorney General of the State of New Mexico; JUANITA HILL, as State Gasoline Tax Collector of the State of New Mexico, and CLYDE TINGLEY, as Governor of the State of New Mexico,

Appellants.

No. 520

APPELLANTS' BRIEF

PRELIMINARY STATEMENT

This case comes on for hearing in this Court upon an appeal by defendants in the lower Court from a decree of injunction of a statutory three-judge Court for the United States District Court of New Mexico.

A STATEMENT OF THE FACTS

The facts in this case are contained in a stipulation of

facts filed in the lower Court and appearing on Pages 29 to 33 of the Transcript of Record. The facts there stated are briefly these: Plaintiff is a corporation foreign to the State of New Mexico. It was and is engaged in the operation of motor busses as a common carrier of passengers across the State of New Mexico. Its operations, so far as New Mexico is concerned, are purely interstate. In the operation of its interstate motor busses it buys gasoline outside of the State of New Mexico, places said gasoline in the fuel tanks on its motor busses and uses said gasoline to propel said vehicles over the state-owned highways of the State of New Mexico. As to the amount of tax claimed to be due to the State of New Mexico, all that appears from the records is that it exceeds the sum of Three Thousand Dollars ($3,000.00).

PROPOSITION OF LAW

The threatened application of Chapter 176 of the Session Laws of 1933 of the State of New Mexico to the appellee, so far as the same relates to gasoline or other motor fuel purchased by appellee outside of New Mexico and used in appellee's vehicles in New Mexico to propel the same in interstate commerce, is not contrary to nor prohibited by Article 1, Section 8, Clause 3 of the Constitution of the United States, because:

(a) When considered in conjunction with Chapter 31, Session Laws of New Mexico for 1931, said Chapter 176 constitutes merely a compensatory and regulatory exaction for the use of the public highways of the State of New Mexico.

(b) Even if said Chapter 176 should be construed as applied to appellee as an excise tax upon the use of gasoline

in interstate commerce, it is justifiable as a compensatory and regulatory exaction for the use of state facilities.

(c) The Supreme Court of New Mexico has not construed said Chapter 176, Laws of 1933, in conjunction with Chapter 31, Laws of 1931, so that its application to appellee will be a violation of Article 1, Section 8, Clause 3 of the Constitution of the United States, and

(d) The characterization of Chapter 176, Laws of 1933, by the Supreme Court of New Mexico is not binding upon the Supreme Court of the United States where the question involved is one of deprivation of rights secured by the Federal Constitution.

MATERIAL STATUTORY AND CONSTITUTIONAL PROVISIONS

The period covered by this litigation runs from April, 1932, until May 25, 1935. The tax claimed by appellants to be due from April, 1932, to June, 1933, arose under Chapter 29, New Mexico Session Laws of 1929, Section 60-101, New Mexico Statutes Annotated, Compilation of 1929, which reads as follows:

> "There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this state for any purpose; Provided, that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this state by distributors or dealers upon the sale of the gasoline so used."

There was also effective at this time Section 60-203, New

Mexico Statutes Annotated, Compilation of 1929, which provided:

> "There is hereby levied and imposed an excise tax of five cents per gallon upon the sale of all gasoline sold in this state except gasoline sold in original packages or containers as purely interstate commerce sales."

During all of the period from April, 1932, to June, 1933, there was also in effect Chapter 31 of the New Mexico Session Laws of 1931. This act was entitled as follows:

> "An Act to Provide For Refunding The Excise Taxes Paid on Gasoline or Motor Fuel Purchased and Used By Consumer Other Than in Motor Vehicles Operated or Intended to be Operated on Any of The Public Streets or Highways of The State of New Mexico; etc."

Section 1 of this act provided:

> "Section 1. That every person, firm, partnership, corporation or association having paid for any one purchase, the excise tax to a distributor or wholesaler upon fifty-six (56) or more gallons of gasoline or motor fuel, which gasoline or motor fuel was purchased and used solely and exclusively by such person, firm, partnership, corporation or association other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico, shall be entitled to a refund equal to the amount of tax so paid, upon compliance with the provisions of this act, and not otherwise."

The statutes above quoted were all effective until 1933 when the 1933 Legislature repealed the two sections above

quoted levying the gasoline tax and adopted instead Section 2, Chapter 176, New Mexico Session Laws of 1933, as follows:

> "There is hereby levied and imposed an excise tax of five cents (5c) per gallon upon the sale and use of all gasoline and motor fuel sold or used in this state for any purpose except gasoline sold in interstate commerce, Provided, that this tax shall be collected only once upon any particular motor fuel, and where the excise tax has been paid in this state by distributors or dealers upon the sale a like tax shall not be collected for the use of the same motor fuel; Provided, however, that nothing in this Act shall prohibit any incorporated municipality from assessing and collecting the tax provided for in Chapter 159 of the 1931 Session Laws."

The same Legislature amended the gasoline refund statute, Chapter 31 of the Laws of 1931, by Chapter 162 of the Laws of 1933, but the only pertinent change made in the refund law of 1933 was to change the minimum purchase from fifty-six (56) gallons to fifty (50) gallons.

The 1933 statutes just referred to were effective from their effective dates in 1933 to the beginning of this action in the lower Court.

The proceeds of the New Mexico state gasoline tax are distributed in accordance with Section 60-205 of the New Mexico Statutes Annotated, Compilation of 1929, which provided:

> "The proceeds of said tax, except such portion thereof as may be necessary to pay the principal and interest of debentures issued hereunder, shall be paid into the state treasury and covered into the state road fund to be used for maintenance, construction and im-

provement of state highways and to meet the provisions of the federal aid road law."

The Federal Constitutional provision involved herein is Article 1, Section 8, Clause 3 of the Constitution of the United States which provides:

"The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

ARGUMENT

I. WHEN CONSIDERED IN CONJUNCTION WITH CHAPTER 31, SESSION LAWS OF NEW MEXICO FOR 1931 AND THE AMENDMENTS THERETO, SAID CHAPTER 176 CONSTITUTES MERELY A COMPENSATORY AND REGULATORY EXACTION FOR THE USE OF THE PUBLIC HIGHWAYS OF THE STATE OF NEW MEXICO.

By the decree entered in the lower Court the defendants were enjoined from "arresting or causing or authorizing the arrest of plaintiff, or its agents or employees, or otherwise preventing or interfering with plaintiff in its conduct of its operation of busses as a common carrier of passengers and property for compensation over the public highways of the State of New Mexico in interstate commerce, because of any alleged non-compliance with Chapter 176 of the Session Laws of 1933 of the State of New Mexico so far as relates to gasoline or other motor fuel purchased by plaintiff, within other states than the State of New Mexico, and placed or to be placed in its vehicles in other states than the State of New Mexico, and used in said vehicles for the propelling of the same in interstate commerce within the State of New Mexico; and from enforcing said statute in any other manner against this plaintiff or its predecessors in interest by reason of the use of gasoline or other motor fuel within the State of New Mexico that shall have been or shall be acquired, or purchased and placed in vehicles outside of the State of New Mexico, and used as aforesaid." (Tr. 41 et seq.)

That portion of Chapter 176, Laws of 1933, which imposes the tax, application of which to the appellee has been enjoined by the lower Court, reads as follows:

"Section 2. There is hereby levied and imposed an excise tax of five cents (5c) per gallon upon the sale and use of all gasoline and motor fuel sold or used in this state for any purpose except gasoline sold in interstate commerce, Provided, that this tax shall be collected only once upon any particular motor fuel, and where the excise tax has been paid in this state by distributors or dealers upon the sale a like tax shall not be collected for the use of the same motor fuel; Provided, however, that nothing in this Act shall prohibit any incorporated municipality from assessing and collecting the tax provided for in Chapter 159 of the 1931 Session Laws."

The appellants contended below and now contend that the imposition of this tax when construed in the light of Chapter 31, Laws of 1931, constitutes merely a compensatory and regulatory exaction for the use of state facilities, to-wit: the public highways of the state. Section 1 of Chapter 31, Laws of 1931, provides:

"That every person, firm, partnership, corporation or association having paid for any one purchase, the excise tax to a distributor or wholesaler upon fifty-six (56) or more gallons of gasoline or motor fuel, which gasoline or motor fuel was purchased and used solely and exclusively by such person, firm, partnership, corporation or association other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico, shall be entitled to a refund equal to the amount of tax so paid, upon compliance with the provisions of this act, and not otherwise."

It is stipulated that the gasoline taxes collected by the State of New Mexico under the provisions of Chapter 176, Laws of 1933, are distributed in accordance with the pro-

visions of Section 60-205, New Mexico Statutes Annotated, 1929 Compilation, (Tr. 32) which latter section reads in part as follows:

> "The proceeds of said tax, except such portion thereof as may be necessary to pay the principal and interest of debentures issued hereunder, shall be paid into the state treasury and covered into the state road fund to be used for maintenance, construction and improvement of state highways and to meet the provisions of the federal aid road law."

It is apparent from the foregoing that the entire proceeds of the tax in question has, at all times material to this discussion, been allocated to highway purposes. This is a strong indication that the tax was levied only as compensation for the use of the highways. In Interstate Transit, Inc., vs. Lindsey, 283 U. S. 183, 75 L. Ed. 953, this court said:

> "While a state may not lay a tax on the privilege of engaging in interstate commerce (Sprout vs. South Bend, 277 U. S. 163, 72 L. Ed. 833, 62 A.L.R. 45, 48 S. Ct. 502), it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. (Kane vs. New Jersey, 242 U. S. 160, 168, 169, 61 L. Ed. 222, 227, 228, 37 S. Ct. 30; Clark v. Poor, 274 U. S. (186) 554, 71 L. Ed. 1199, 47 S. Ct. 702; Sprout vs. South Bend, supra (277 U. S. 169, 170, 72 L. Ed. 836, 837, 62 A.L.R. 45, 48 S. Ct. 502.) As such a charge is a direct burden on interstate commerce, the tax can not be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of

> regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use (Interstate Busses Corp. vs. Blodgett, 276 U. S. 245, 72 L. Ed. 551, 48 S. Ct. 230), or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, supra, or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick vs. Maryland, 235 U. S. 610, 612, 59 L. Ed. 385, 35 S. Ct. 140; Interstate Busses Corp. vs. Blodgett, 276 U. S. 245, 250-252, 72 L. Ed. 551, 554, 555, 48 S. Ct. 230. Compare Interstate Busses Corp. vs. Holyoke Street R. Co. 273 U. S. 45, 51, 71 L. Ed. 530, 534, 47 S. Ct. 298."

If, as stated above, a state "may impose even upon motor vehicles engaged exclusively in interstate commerce a charge as compensation for the use of the public highways," why may it not impose a similar charge upon *gasoline* used exclusively in interstate commerce? This Court has many times affirmed and reaffirmed the doctrine that a state may exact of interstate commerce a reasonable and non-discriminatory charge for the use of state facilities. See Clark vs. Poor, 274 U. S. 554, 71 L. Ed. 1199; Hendrick vs. Maryland, 235 U. S. 610; Interstate Busses Corporation vs. Blodgett, 276 U. S. 245, 73 L. Ed. 551; Kane vs. New Jersey, 242 U. S. 159, 61 L. Ed. 228.

Appellee has not contended below and we assume will not contend here that the tax in question is either discriminatory or unreasonable. It is apparent that it bears a direct relation to the use of the highways since the gasoline is used on the highways for the propulsion of appellee's motor busses. (See Stipulation of Facts, Tr. 30).

As stated in Hendrick vs. Maryland, supra, with reference to charges imposed on interstate commerce for the use of state facilities "the amount of the charges and the method of collection are primarily for determination by the state itself." If a state may impose such a charge on motor busses, why may it not employ a different method of collection, namely, the imposing of a similar charge upon gasoline used in such busses—the result is the same.

The majority of the Court below seem not to have any serious doubt upon this score as is evidenced by the following portion of their opinion:

> "The right to carry on interstate commerce gives plaintiff no right to use state highways or parks in the state house grounds as a garage, without paying a fair charge therefor. Clark vs. Poor, 274 U. S. 554; Carley & Hamilton, Inc., vs. Snook, 281 U. S. 66; Interstate Busses Corp. vs. Blodgett, 276 U. S. 245; Continental Baking Co. vs. Woodring, 286 U. S. 352. It is neither charged nor proven here that five cents a gallon is, together with the modest mileage charge laid by another statute, such an exorbitant charge as to be a tax disguised as compensation, nor that the method has no reasonable relation to the use made for the highways. We know that the heavier and faster the bus, the more damage it does to the highways, and in rough approximation, the more gasoline it uses. If the legislature, by this statute, exacted compensation for the use of the highways, plaintiff must fail."

The difficulty seems to be in determining whether or not the charge imposed by the New Mexico statutes referred to is a compensatory exaction for the use of the highways. As applied to appellee we can not see what else it could be. There is no contention that appellee uses gasoline for any other purpose than to propel its motor busses over the pub-

lic highways of New Mexico. The tax imposed is in direct relation to the amount of gasoline so used. The entire proceeds of the tax go to the support and maintenance of the state highways. What other purpose could it have than to compel appellee and other similarly situated to bear their just proportion of the expense of constructing and maintaining the state's highways? The answer was made below that by the terms of the statute the tax is imposed not only upon the use of gasoline upon the highways but upon its use for any purpose. That is true, but as applied to appellee the tax is imposed only for gasoline used on highways. Even though the tax might be imposed on other users of gasoline, it is common knowledge that a large part of the gasoline used in all states is used to propel motor vehicles over the public highways.

In 1929 a taxing statute was passed similar to the one in question, being Chapter 29, Laws of 1929, (Sec. 60-101, 1929 Compilation), which reads as follows:

> "60-101. Five cents per gallon excise tax. There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this state for any purpose; Provided, that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this state by distributors or dealers upon the sale of the gasoline so used."

When the 1929 statute, above quoted, was enacted, it seems reasonable to us that the New Mexico Legislature intended to exact of users of the highways compensation for such use and in order to avoid evasion of the tax it compelled non-users of the highways to also contribute to their upkeep. One purpose of the tax is plain, namely, to acquire funds with which to build and maintain highways.

Since the Legislature was undoubtedly aware that a large part of the gasoline sold and used in this state would be used on the public highways it seems equally plain that it intended to exact of such users a reasonable compensation.

The 1933 statute is not materially different from the 1929 statute above quoted, but it is important to note that it was passed by the Legislature with the presumed knowledge that Chapter 31, Laws of 1931, was in full force and effect. The 1931 statute, which has been quoted above, makes provision for the refund of all gasoline taxes where the gasoline is used "other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico." Having in mind this refund provision, it seems almost beyond question that the New Mexico Legislature intended that Chapter 176, Laws of 1933, should merely provide a method of collecting compensation for the use of the highways. The two statutes should be construed in *pari materia*. U. S. vs. Collier, 3 Blatch 325, 25 Fed. Cases No. 14833.

It is true that the Legislature might have exempted nonusers of the highways from payment of the tax, but, as pointed out by Judge Bratton in his dissenting opinion in the Court below, this would have involved obvious administrative difficulties and, after all, what great difference does it make whether the tax is collected from all users of gasoline and refunded to those not using it on the highways, or whether it is collected in the first place from only those who use (or say they intend to use) such gasoline on the public highways of the state? The practical effect and operation of the statute is the same in either case, and it is upon its practical operation and effect that the question of whether or not a state statute deprives a party of right secured by

federal constitution depends. (See American Manufacturing Co. vs. St. Louis, 250 U. S. 459, 63 L. Ed. 1084).

We do not find a case in which this Court has passed upon the validity of a gasoline tax as applied under conditions the same as those existing in the present case. However, we do find decisions of other courts upon state gasoline tax statutes which reflect views the same or similar to those we have expressed. In the case of Varney Air Lines vs. Babcock, 1 Fed. Sup. 687, the Court held that a state gasoline tax of five cents (5c) per gallon might be levied and collected from an interstate carrier who bought gasoline outside of the state but used it within the state where the use within the state involved the use of state facilities. We believe that the reasoning and principle evoked in the Varney case, supra, is applicable to the case at bar, but submit that in the case before this Court the situation is even stronger to uphold the tax for the reason that the tax imposed is more closely related to the actual use and benefit by the plaintiff of the state facilities.

Another case to which we wish to call the Court's attention as being closely in point to the case at bar is State vs. Johnson, decided by the Supreme Court of Louisiana in 1931 as reported in 138 South. 503. In that case the State of Louisiana levied a tax of four cents (4c) per gallon on all gasoline sold, used or consumed in the state. The defendant was a common carrier engaged partly in interstate and partly in intrastate business. The gasoline in question was purchased outside of the State of Louisiana but used in defendant's motor busses on the highways within the State of Louisiana. In deciding this case the Court reviewed most of the cases cited by plaintiff herein but held them not to be applicable in the following language:

"The gasoline tax levied under the statutes of this state is solely for the purposes of building and maintaining highways and bridges which belong to the state. Every dollar of it is allocated to the highway fund. The defendant company, while engaged in interstate traffic, makes the public highways of the state their "place of business." It is a fact conceded by all that motorbuses for carrying passengers and motortrucks for hauling freight, due to their great weight and the high speed at which they travel, do more damage to the public roads than perhaps all other traffic combined. Their use of the highways throws a heavy burden upon the state in the way of maintenance and upkeep. The state can not be called upon to carry this burden of expense without recompense. 'Upon the theory that interstate business must 'pay its way', those who are engaged therein must pay their just and reasonable proportion of the expense of building and maintaining the roads which they use."

We do not overlook the case of Helson vs. Kentucky, 279 U. S. 245, 73 L. Ed. 683, but will discuss it under another point in this brief.

II. THE SUPREME COURT OF NEW MEXICO HAS NOT CONSTRUED SAID CHAPTER 176, LAWS OF 1933, IN CONJUNCTION WITH CHAPTER 31, LAWS OF 1931, SO THAT ITS APPLICATION TO APPELLEE WILL BE A VIOLATION OF ARTICLE 1, SECTION 8, CLAUSE 3, OF THE CONSTITUTION OF THE UNITED STATES.

The opinion of the majority of the three-judge Court below leads us to believe that it might have reached a different conclusion were it not for two decisions of the Supreme Court of New Mexico—Breece Lumber Co. vs. Mirabal, 34 N. M. 643, 287 P. 699, and Trancontinental & Western Air,

Inc., vs. Lujan, 36 N. M. 64, 8 P. (2nd) 103. We do not attribute to these two decisions the fatal consequences given them by the majority. The dissenting opinion of Circuit Judge Bratton seems to afford a complete answer to the conclusions of the majority on this point.

We may perhaps be presumptuous in attempting to add anything to the able opinion of Judge Bratton, but due to the great importance of the case to appellants and the far reaching effect of the lower Court's decision upon the taxing policy of the State of New Mexico, we feel impelled to express in our own language the reasons which occur to us why the two New Mexico decisions referred to are not controlling in the present case.

In the first place, neither decision attempts to construe Chapter 176, Laws of 1933, the statute now subject to attack. The Breece Lumber Company case was decided March 31, 1930, about a year before Chapter 31, Laws of 1931, the refunding statute, was enacted. Both decisions have reference to and construe Chapter 29, Laws of 1929. Although the language of Chapter 176, Laws of 1933, is similar to that of the 1929 statute in the same way that it construed the 1929 statute, especially in view of the fact that the 1933 statute was enacted shortly after the passage of the refunding act of 1931. But supposing for the sake of argument that it might, if called upon, place a like construction upon the 1933 statute, *it has not yet done so.*

In the Transcontinental case, supra, the New Mexico Court on rehearing mentioned the refunding statute in the following language:

> "Since this suit was instituted the Legislature has made provision for refunds to purchasers of gasoline for use otherwise than in motor vehicles operated on

> the highways. Laws 1931, c. 31. Appellee suggests that this may well be considered as a legislative construction of 1929 Comp. sec. 60-203, and as evincing legislative intent to exempt gasoline sold for aircraft use. The history of gasoline tax legislation in this state will not warrant such construction."

As so clearly pointed out by Judge Bratton and so plainly appears from the language of the New Mexico Court, no rights were involved which accrued subsequent to the enactment of the 1931 refunding statute. Consequently there was no occasion for construing the two statutes in *pari materia* and the court did not do so. All that can be said of these two decisions is that they construe *Chapter 29, Laws of 1929,* with reference to the facts before the Court, thereby giving to the statute a meaning *as of the time of its enactment.* However, even if we maintain, as we should and do, "a decent respect for these opinions of the highest court of New Mexico" we still do not agree with the conclusion reached by the majority of the lower Court. We assert that neither decision has announced any doctrine necessarily fatal to appellants' cause. We are here concerned with the use tax. We call attention to the following language of Justice Watson in the case of Transcontinental and Western Air, Inc., vs. Lujan:

> "The use tax comes to this: For the privilege of traversing New Mexico in the air, of landing on our soil, and of transporting mail and passengers into and out of our state, we exact a price measured by the quantity of gasoline consumed." (36 N. M. 67).

If the learned justice had been dealing with facts now before this Court, might he not have said "For the privilege of traversing New Mexico over the public highways and of using the highways of this state, owned and maintained at

great expense by the state and especially built to withstand the tremendous wear and tear caused by large and heavy motor busses used in interstate commerce, we exact a price measured by the quantity of gasoline consumed."

The decision of the lower Court in this case seems to be based on the assumption that in view of the New Mexico decision referred to, Chapter 176, Laws of 1933, imposes a "tax" upon the use of an instrumentality of interstate commerce rather than a "charge" for the use of state-owned facilities, that it therefore directly burdens interstate commerce, and consequently is beyond the power of the state to impose. Whether we call it a "tax" or a "charge" seems to us of little consequence. Many "charges" are exacted in the form of excise or license taxes. Kane vs. New Jersey, supra; Hendrick vs. Maryland, supra. In referring to the power of states to exact from interstate commerce compensation for the use of state facilities this Court, in a most recent opinion handed down December 9, 1935, in the case of Clyde Mallory Lines vs. Alabama, said:

> "Its most recent manifestation is the *levy of a tax* which represents a reasonable charge upon interstate automobile traffic passing over state highways, upheld in Kane vs. New Jersey, 242 U. S. 160; Clark vs. Poor, 274 U. S. 554; Interstate Busses Corporation vs. Blodgett, 276 U. S. 245; Hendrick vs. Maryland, 235 U. S. 610." (Italics ours).

It does not seem to make any difference in a case of the kind now under consideration that interstate commerce may be directly burdened. In Interstate Transit, Inc., vs. Lindsey, supra, this Court, in referring to a charge as compensation for the use of public highways, said:

"Such a charge is a direct burden on interstate commerce."

The critical question of whether a state statute as applied to a particular situation levies a tax upon the privilege of engaging in interstate commerce, or whether it merely exacts a charge for the use of state facilities, seems to us to depend upon the purpose the Legislature had in mind in adopting it. That purpose may be indicated by the disposition made of the proceeds, by the manner of applying the tax to users of the highways, by proportioning the burden of the tax to the amount of such use and possibly in other ways. It can not be denied that the tax here in question is peculiarly fitted to exact of highway users an amount in direct proportion to the use enjoyed. Heavy busses and trucks do more damage to the highways than lighter vehicles, use more gasoline and consequently pay more tax. Frequent operations cause more wear and tear to the highways than occasional operations, result in greater gas consumption, and a proportionately higher tax burden. Having in mind these commonly known facts we feel that the New Mexico Legislature must have purposed that the 1933 gasoline tax act, as applied to highway users, should exact from them a compensation for such use. Nothing in either of the two New Mexico decisions relied upon in the lower Court by the appellee negatives such a conclusion.

III. EVEN IF SAID CHAPTER 176 SHOULD BE CONSTRUED AS APPLYING TO APPELLEE AS AN EXCISE TAX UPON THE USE OF GASOLINE IN INTERSTATE COMMERCE, IT IS JUSTIFIABLE AS A COMPENSATORY AND REGULATORY EXACTION FOR THE USE OF STATE FACILITIES.

We have heretofore pointed out under Point I of the Argument in this brief that the state may exact of interstate commerce a reasonable and non-discriminatory compensation for the use of state facilities. This rule has long been established by this Court. In that portion of our brief just referred to we have cited numerous cases to support this view and we redirect the Court's attention to these cases at this point.

Appellee will urge that if this tax imposed by the New Mexico statute is a tax upon the use of gasoline in motor vehicles instead of a tax for the privilege of using the state highways measured by the number of gallons of gasoline used thereon that it is invalid under the rule of Helson vs. Kentucky, supra. This also seems to have been the real basis of the decision of the lower Court. We of course do not concede that the New Mexico tax is a tax upon the use of gasoline, but rather contend that it is a tax for the use of the public highways of the State of New Mexico. We submit, however, that even should this Court take the view that the New Mexico tax in question is a tax upon the use of gasoline that this case should not be governed by the rule of the Helson case.

In the Helson case there was no question whatever of the use of state facilities. The ferry-boat which was using the gasoline attempted to be taxed by the State of Kentucky was being operated on a river. There is no intimation in that case that the boat was docked at a publicly owned dock

nor that the state contributed in any manner towards the maintenance of any facilities used in the operation of the ferry-boat. Here we have an entirely different situation. It must be conceded that all of the roads over which the motor busses using the gasoline attempted to be taxed in this case are owned by the State of New Mexico. The state has expended vast sums of money in the building of these roads. It expends further large sums annually for their maintenance. Every penny of the proceeds of the gasoline tax here in question is used by the state either in paying off the bonded obligations already incurred in building these highways or in the cost of maintaining them with the exception of a small percentage of the proceeds used in administrative purposes in collecting the taxes so imposed.

Applying the well established rule illustrated in the cases of Interstate Busses Corporation vs. Blodgett, Clark vs. Poor, supra, Interstate Transit, Inc., vs. Lindsey, supra, that even interstate commerce must pay its way when using state owned and maintained facilities, we submit that the rule in the Helson case is not applicable and must be qualified by this Court to the extent that where the use of such state facilities is involved and the tax imposed is a reasonable, non-discriminatory exaction of compensation for the use of such facilities, that the method of collecting such compensation is immaterial. This Court, in the Helson case, pointed out that gasoline used to propel vehicles in interstate commerce is an instrumentality of interstate commerce and as such can not be taxed but where this Court has also sustained taxes upon motor busses themselves engaged in interstate commerce when such tax is levied as compensation for the use of public facilities, we can not see the vice of levying the tax upon the gasoline used to propel a vehicle when a tax for the same purpose upon the vehicle

itself would be valid. We submit that the language of the Court used in the Helson case supports this position. The Court in that case said:

> "A tax laid upon the use of the ferry-boat would present an exact parallel."

So we contend here that since this Court has sustained taxes levied on vehicles used in interstate commerce when levied as compensation for the use of public facilities. These are exact parallels to a tax levied upon the use of gasoline in such vehicles when levied as compensation for the use of state facilities.

In speaking of this principle in the case of Hendrick vs. Maryland, supra, the Court said:

> "The amount of the charges and *the method of collection are primarily for determination by the state itself;* and so long as they are reasonable and are fixed according to some uniform, fair and practical standard, they constitute no burden on interstate commerce. Transportation Company vs. Parkersburg, 107 U. S. 691, 692; Huse vs. Glover, 119 U. S. 543, 548, 549; Monongahela Navigation Company vs. United States, 148 U. S. 312, 329, 330; Minnesota Rate Cases, 230 U. S. 352, 405; and authorities cited." (Italics our own.)

And again this Court recognized specifically that a tax might be laid directly upon interstate commerce as its reasonable compensation for the use of public facilities in Interstate Transit, Inc., vs. Lindsey, supra, in these words:

> "If such a charge is a direct burden on interstate commerce, the tax can not be sustained *unless it appears affirmatively some way that it is levied only as*

compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition such as a mileage tax directly proportioned to the use (Interstate Busses Corporation vs. Blodgett, 276 U. S. 245, 72 L. Ed. 551, 41 S. Ct. 230), *or by the express allocation of the purpose of the tax to highway purposes,* as in Clark vs. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, supra, or otherwise. *Where it is shown that the tax is so imposed it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory.*" (Italics our own.)

Taking this language last above quoted as our guide in this case, we submit that there can be no question but what the New Mexico tax in question is valid as applied to appellee.

We call the Court's attention to two exhaustive and helpful annotations dealing with the whole subject here under discussion. The first is an annotation following the case of Foster & Creighton Company vs. Graham (Tenn.), 285 S. W. 570, in 47 A.L.R. 980, and a later supplementary annotation following the case of Gregg Dyeing Company vs. Query, 286 U. S. 472, 76 L. Ed. 1232, 52 S. Ct. 631, appearing in 84 A.L.R. 839. These two annotations contain, we believe, all of the decided cases dealing with gasoline tax statutes up to the time of their compilation.

IV. The Characterization of Chapter 176, Laws of 1933, By the Supreme Court of New Mexico Is Not Binding Upon the Supreme Court of the United States Where the Question Involved Is One of Deprivation of Rights Secured by the Federal Constitution.

The majority opinion of the Court below seems to us to have been based almost solely upon the proposition that the Supreme Court of the State of New Mexico in the Breece Lumber Company case, supra, and the TWA Airline case, supra, had characterized the state statute in question as a use tax on the use of gasoline and that by this characterization the Federal Court was bound. Indeed, the majority opinion states:

> "Free to construe this statute *a priori*, the fact that the proceeds of the sales tax, and perhaps of the use tax, go exclusively to highway financing, would be most persuasive. * * *
>
> But we are not free. The New Mexico statute means what the New Mexico Supreme Court says it means."

We do not agree that the New Mexico Supreme Court in the cases referred to interpreted the statute in the manner held by the lower Court, but conceding for the sake of argument that the New Mexico Supreme Court had characterized the statutes in question in this manner, we submit that the lower Court was in error in assuming that it was absolutely bound by such characterization.

We have here appellees contending that the statute is unconstitutional as attempted to be applied in the situation here in question, that it thus invades a right guaranteeing appellee under the Federal Constitution, to-wit: a violation of the commerce clause of the Federal Constitution. By a

well established principle of law in such instances, neither the name of the statute, its interpretation or characterization by a state court is binding upon the Federal courts.

This Court said in the case of American Manufacturing Company vs. St. Louis, 250 U. S. 459, 63 L. Ed. 1084:

> "As a matter of construction this, upon familiar principles, is conclusive upon us. But, as has been held very often, *the question whether a state law or a tax imposed thereunder deprives a party of rights secured by the Federal Constitution depends not upon the form of the act, nor upon how it is construed or characterized by the State Court, but upon its practical operation and effect.*"

To the same effect see St. Louis Southwestern Railway Company vs. Arkansas, 235 U.S. 350, 362, 59 L. Ed. 265, 271, 35 S. Ct. Rep. 99; Mountain Timber Company vs. Washington, 243 U. S. 219, 237, 61 L. Ed. 685, 696, 37 S. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; Crew Levick Company vs. Pennsylvania, 245 U. S. 293, 294, 62 L. Ed. 295, 297, 38 S. Ct. Rep. 126; Henderson vs. Mayor of New York, 92 U. S. 259, 268; Williams vs. Mississippi, 170 U. S. 213, 225; Smith vs. St. Louis and Southwestern Railway, 181 U. S. 248, 257; Stockard vs. Morgan, 185 U. S. 27, 37; Reid vs. Colorado, 187 U. S. 137, 151; Galveston, Harrisburg Railway vs. Texas, 810 U. S. 217, 227; Western Union Telegraph Company vs. Kansas, 216 U. S. 146, 162; Sioux Remedy Company vs. Cope, 235 U. S. 197; Macellan Company vs. Massachusetts, 279 U. S. 630, 73 L. Ed. 874; Gregg Dyeing Company vs. Query, supra.

We believe that this principle is most surely applicable in the present case and in looking at the practical effect

and operation of the statute it can be held only as a compensatory tax for the use of public highways in the state.

CONCLUSION

We submit that the decree of the lower Court enjoining appellants from enforcing the statutes in question as against the operations of appellees is erroneous and should be reversed.

Respectfully submitted,

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RECORD

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

GOLDEN EAGLE WESTERN LINES, INC., a corporation,

Appellee,

vs,

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Appellants.

No. 520

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

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SANTA FE NEW MEXICAN PUBLISHING CORP.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO

REPLY BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

It is not the intention of appellants in filing this Reply Brief to repeat arguments made in their original brief or to enlarge upon such arguments, but it is our intention only to answer the new arguments and theories advanced by appellee in its Answer Brief which have not been heretofore touched upon by appellants and which for the most part were not even advanced in the trial of this case before the lower court.

PROPOSITIONS OF LAW

I. REPLIES TO PROPOSITIONS OF LAW RAISED BY APPELLEE'S POINT I.

(a) Appellants do not concede that, were it not for the provisions of Chapter 31, 1931 Session Laws of New Mexico and amendments thereto, the gasoline tax acts here under consideration should not be construed as compensation for the use of the public highways.

(b) There is statutory authority for disposing of the proceeds of the gasoline use tax imposed by Chapter 176, 1933 Session Laws of New Mexico.

(c) Chapter 176, 1933 Session Laws of New Mexico, can be construed as exacting compensation for the use of public highways without violating Section 16, Article IV, of the New Mexico Constitution.

II. REPLIES TO PROPOSITIONS OF LAW RAISED BY APPELLEE'S POINT II.

(a) Chapter 31, 1931 Session Laws of New Mexico as amended, applies both to the sales tax and the use tax on gasoline.

(b) Even if Chapter 31, 1931 Session Laws of New Mexico as amended, does not by its terms specifically apply to the gasoline use tax, nevertheless when construed with Chapter 176, 1933 Session Laws of New Mexico, it determines the character of the New Mexico gasoline sales and use taxes to be exactions of compensation for the use of public highways.

(c) Chapter 31, 1931 Session Laws of New Mexico as amended, and Chapter 176, 1933 Session Laws of New Mexico, may be construed in *pari materia* without violating Section 18 of Article IV, of the New Mexico Constitution.

III. REPLIES TO PROPOSITIONS OF LAW RAISED BY APPELLEE'S POINT V.

(a) Administrative provisions of Chapter 176,

Laws of 1933, were held by the lower court to be appropriate to the enforcement of the statute.

(b) Appellants have no intention of requiring appellee to domesticate in New Mexico.

MATERIAL STATUTORY PROVISIONS

The following New Mexico statutes are considered material to the arguments made in this brief and are quoted in full in the Appendix:

A portion of Section 6, Chapter 96, Laws of 1929, (Section 60-201, 1929 Compilation). See Appendix "1".

Chapter 162, Session Laws of 1933. See Appendix "2".

A portion of Section 1, Chapter 154, Laws of 1919, (Section 64-316, 1929 Compilation). See Appendix "3".

A portion of Chapter 144, Laws of 1931, (Sections 1 and 3). See Appendix "4".

A portion of Chapter 30, Session Laws of 1933, (Sections 1 and 3). See Appendix "5".

APPELLANTS' REPLY TO PROPOSITIONS OF LAW RAISED BY APPELLEE'S POINT I.

With reference to Point I. of our original brief we wish to make our position absolutely clear. We deny the statement in Appellee's Brief that we admit that the gasoline taxing act here under consideration "should be construed • • • not as compensation for the use of the public highways, were it not for the provisions of Chapter 31, 1931 Session Laws of New Mexico, and the amendments thereto." (Pages 11 and 12, Appellee's Brief) Neither do we concede that the Supreme Court of New Mexico has made any such holding in the cases of Breece Lumber Company vs. Mirabal, 34 N. M. 643, 287 Pac. 699, and Transcontinental & Western Air, Inc., vs. Lujan, 36 N. M. 64, 8 Pac. (2d) 103. The Supreme Court of New Mexico has never had occasion to pass upon the question of whether or not our gasoline taxing statutes were intended to exact compensation from highway users for the use of state owned facilities. The cases above referred to merely decide that under the laws existing at the time the causes of action ac-

crued, non-users of the highways must pay the tax. The same thing is true today. The only difference now is that such non-users are entitled to a refund of the taxes so paid. This is a difference which greatly strengthens the appellants' position but one which we do not consider absolutely essential. See Sparling vs. Refunding Board, —— Ark. ——, 71 S. W. (2d) 182. The gasoline tax acts in Arkansas at the time this case was decided imposed the tax on others than those who used the highways but the Supreme Court of Arkansas held that the legislature was justified in so imposing the tax in order to avoid fraud and imposition and that the tax was for the privilege of using the highways. In the case of State vs. Johnson, 138 South. 503, 173 La. 669, the Louisiana gasoline tax also applied to non-users of the highway. Nevertheless, the Louisiana Supreme Court upheld it against the same attack now being made here and upon the grounds which we are now urging.

Appellee for the first time claims that there is no New Mexico statute disposing of the proceeds of the use tax imposed by Chapter 176, Laws of 1933. This argument was not made to the Court below. Judge Bratton in his dissenting opinion says: (Tr. 37 and 38)

> "No argument is presented with respect to the application of the funds derived from the tax on the sale and that on the use of gasoline. All parties assume that the funds derived from both sources are applied, first, to the discharge of outstanding highway debentures and then to the construction, operation and maintenance of public highways. (fol. 53) The law has been uniformly administered in that manner and it, therefore, is unnecessary to turn aside for the purpose of considering whether there is any distinction between the uses to which the two classes of revenue may be devoted."

In referring to the 1929 use tax (Section 1, Chapter 29, Laws of 1929) the Supreme Court of New Mexico in the Breece Lumber Company vs. Mirabal case, supra, said:

> "It is likewise true that the entire proceeds of the

tax are devoted by statute to the payment of such bonds and debentures as may have been issued by the state to secure a fund with which to build and improve the highways of the state."

The only statute to which the Court could have referred is the one to which we have already called this Court's attention, namely, Section 60-205, 1929 Compilation, (Section 2, Chapter 20, Laws of 1927). Considering the long administrative construction of this statute by those charged with its enforcement as well as the construction placed upon it by the Supreme Court of the state, there seems to be little doubt that it provides the means for distributing the proceeds of the use tax imposed by Chapter 176, Session Laws of 1933. (See Section 13, Chapter 176, Laws of 1933; page 42, Appellee's Brief.)

Appellee makes a statement at page 14 of its brief that the proceeds of the sales tax are "payable not entirely for highway purposes but payable on bond and debenture obligations". Since the bonds and debentures to be paid out of such proceeds were issued for the purpose of securing a fund with which to build and improve roads, it seems obvious to us that the payment of such bonds and debentures is also "for highway purposes". (See Breece Lumber Company vs. Mirabal, supra; also Appendices "3", "4", and "5" of this brief.

Appellee also cites Section 16 of Article IV of the New Mexico Constitution providing that the subject of every bill must be clearly expressed in its title. We hardly see the relevancy of this provision to the facts in the present case. Apparently appellee makes the contention that if the gasoline taxing statute here involved was intended to exact compensation for the use of the highways, such intention should have been expressed in the title of the act. We have not been referred to any New Mexico cases which have so held. We apprehend that the title of the taxing statute may clearly express its subject without going to the extent of describing the exact character and nature of the tax imposed or applying any particular name to it. The New Mexico cases cited by appellee in this connection do not support its contention.

We further call attention to the title of Chapter 176, Laws of 1933, which describes the act as "An Act to Codify and Revise the Gasoline and Motor Fuels Excise Tax Laws; to Define Gasoline and Motor Fuels and Other Terms; to Levy an Excise Tax of Five Cents (5c) per Gallon; * * *" (See Appendix "G", page 38, Appellee's Brief). It will be noted that the tax is not described as an excise tax on the use of gasoline. The term "excise tax" as used in the title of the bill would include a tax, whether levied for the use of the highways or upon the use of gasoline. For whatever significance it may have, we call attention to the fact that the title of Chapter 29, Laws of 1929, uses the words "excise tax upon the use of gasoline". (See Appendix "F", page 38, Appellee's Brief.)

As pointed out in our original brief, we cannot see what difference it makes whether the exaction for the use of the highways be called a "tax", an "excise tax", a "charge", a "toll" or by any other name.

APPELLANTS' REPLY TO PROPOSITIONS OF LAW RAISED BY APPELLEE'S POINT II.

Appellee in its response to Appellants' Point II advances two arguments to the effect that the 1931 refunding act and the amendments thereto do not change the character of the New Mexico gasoline tax laws. The first of these is that the refunding law applies only to the sales tax and not to the use tax and therefore could not change the character of the use tax. The second is that the character of neither the sale nor the use tax could be changed by the refunding law on account of Section 18 of Article IV of the New Mexico Constitution.

Reference is made to the title of the act and it is pointed out that under the terms of the act, in order to obtain a refund, the tax must be paid "to a distributor or wholesaler upon fifty-six (56) gallons or more of gasoline or motor fuel". This contention was not made in the trial court and was never argued there. The administrative construction of the refunding act has uniformily been to refund the use tax when it has been paid to the state even though the gasoline on which it was paid was not pur-

chased in the state. Proof of this administrative construction does not appear in the record because there was no occasion to introduce such proof. In the event this Court should consider the point to be decisive of the case, we feel that it should remand the cause to the lower court to give appellants an opportunity to present proof of this administrative construction.

Considering only the language of the statute, if it is strictly construed, possibly a refund can be made only in cases where there has been a purchase and sale and the tax has been paid to "a distributor or wholesaler". While the word "distributor" is defined in Section 6, Chapter 96, Laws of 1929, (See Appendix "1" of this brief), and Section 1, Chapter 176, Laws of 1933, we find no statutory definition of the word "wholesaler" at the time of the enactment of the 1931 refunding law or any of the amendments thereto. The refunding act does not specifically require that the excise tax be paid to a wholesaler *within the state*. We do not think it is wholly inconceivable that a refund might be made even under the strict terms of the statute in a case where a person bought gasoline from a wholesaler outside of the state, used the gasoline in this state other than in motor vehicles operated or intended to be operated on the public highways of New Mexico and paid the tax to such non-resident wholesaler. In such a case it seems that every requirement of the act could be met in order to obtain the refund. One answer would be that no tax would accrue at the time of such a purchase but if the purchaser intended at the time to use the gasoline in New Mexico we see no reason why he could not pay the tax in advance and he might even pay the tax to such non-resident wholesaler after he had made the non-taxable use of it in this state. If this construction of the act is not proper, it is difficult to see why the word "wholesaler" was used in the refunding act at all since the word "distributor" as defined in the acts referred to is sufficiently broad to cover all wholesalers in this state engaged in the business of selling gasoline.

It is doubtless true that the legislature in passing the refunding act took into consideration the commonly known fact that practically all of the major oil companies opera-

ting in bordering states also operate in New Mexico and there would be very few cases indeed where persons using gasoline in this state off the highways and purchasing the same in quantities of fifty-six (56) gallons or more would purchase it from a wholesaler not duly licensed here as a distributor. The quantities thus used would be so negligible as to hardly deserve specific attention by the legislature.

In this connection we should bear in mind that the tax on sales and the tax on use are very closely related. Under the provisions of the 1933 act as well as its predecessors, the payment of the sales tax avoids payment of the use tax on the same gasoline and vice versa. Only one tax can be collected "upon any particular motor fuel". (See Section 2, Chapter 176, 1933 Session Laws of New Mexico.) In other words, the payment of one tax amounts to a payment of both taxes. Thus the refund of one tax would amount to a refund of both. In practically every case before a sale is made some use of the gasoline has also been made, if nothing more than its storage and withdrawal. Even though the tax is paid at the time of the sale, it is hardly accurate to say that it is the sales tax that is paid and not the use tax because at that time both a sale and a use have been made, either one of which and both of which are taxable.

The Court should take judicial knowledge of the fact that the sales tax for all practical intents and purposes is the important one of the two taxes and the one from which the overwhelming part of the revenue is derived. The use tax is only supplementary to the sales tax for the purpose of preventing an evasion of the sales tax.

> "The obvious purpose of the use tax in this state is to supplement the sales tax, rendering it impossible legally to avoid the latter by purchasing out of the state for use in the state." Breece Lumber Company vs. Mirabal, supra.

When both the sale and use tax are imposed at the same rate and the payment of one discharges the obligation of the other, it is readily seen that in practice very little use tax will be paid but that instead persons using gasoline

within the state will buy it here also. Both the use tax and the sales tax are imposed by a single sentence of the law. Both are referred to as excise taxes. The refunding law also refers to "excise taxes" and not specifically to "sales tax". The two taxes are so closely allied that the character of the principal one must control the character of the supplementary one. The majority opinion of the lower court in this case recognized this close relationship when it said in discussing Transcontinental & Western Air, Inc., vs. Lujan, supra:

> "It cannot be a tax for airplanes and a charge for busses. It is one or the other. True, it was the sales tax there involved, and not the use tax. But where the statute imposes 'an excise tax upon the sale and use', it is hair-splitting to say that 'excise tax' means what it says with reference to 'sale' and an entirely different thing with reference to 'use' in the same breath."

We submit that it would border on the ridiculous to reach a conclusion that a tax on gasoline bought within the State of New Mexico and used on our highways is in the nature of a charge for the use of such highways while a tax on gasoline bought without the state but used exactly in the same manner is an entirely different sort of tax.

We hardly think it is necessary to suggest reasons why the legislature did not in specific terms provide for a refund of the use tax. Many obvious reasons can be advanced. The cases in which a use tax would be incurred where there had been no purchase and sale would be so few as to render the making of refunds in such cases a task involving many administrative difficulties. The making of refunds in such cases would also open the door to fraud and imposition. It is doubtless true that even as the act is written and now administered, many cases arise where unscrupulous persons have obtained refunds to which they are not entitled. In order to prevent such fraud and imposition, the legislature in 1933 enacted Chapter 162 of the Session Laws of that year, Section 2 of which provides that in cases where gasoline is sold for use off the highway,

the seller shall "color black all such gasoline or motor fuel at the time of the sale and purchase". (See Appendix "2" of this brief.). This safeguard can hardly be made applicable in a case where the gasoline was not used on the highways but there was no purchase and sale within this state. To attempt to apply it in such a case would be to require the person who might practice fraud or imposition to perform an act intended to prevent his own fraud.

After all, it seems to us that the point raised by appellee has very little to do with whether or not appellants' position is well taken. The only relevancy which the 1931 refunding act has to the case in hand is to indicate the nature of the tax which the 1933 legislature intended to impose by Chapter 176 of the Session Laws for that year. It can not be successfully disputed that the 1931 refunding act provides a means by which practically all persons not using gasoline on the highways can escape both the use tax and the sales tax. If that means which is provided be not absolutely perfect so as to take care of every conceivable hypothetical case which might be advanced, the appellee is not in a position to complain since it is not so situated as to be entitled to a refund in any case. The refunding act may not be artistically drawn but we are not concerned with that. It is the broad purpose of the act which seems to us of importance. In adopting the refunding act, the New Mexico legislature certainly considered that persons not using the highways and therefore deriving no benefit from the proceeds of the tax should not be burdened by it. It was undoubtedly the purpose of the legislature to relieve such persons from the tax burden which they had theretofore borne and even though its efforts in that direction may not have been entirely successful, nevertheless the very existence of such a purpose would seem sufficiently indicative of the nature of the gasoline tax from that time forward.

Appellee's second contention or argument under this point, as stated above, is that the refunding act could not change the character of either the use or the sales tax on account of Section 18 of Article IV of the New Mexico Constitution. This section, which is quoted in appellee's

brief, page 24, does not, in our opinion, have any bearing whatever upon the matter here under consideration. In this instance there is no contention that the refunding act attempted to extend, amend or revise any existing law by reference only. The situation here is that the refunding act of 1931 was already in existence when Chapter 176 of the 1933 Session Laws was passed and it is only with Chapter 176, Laws of 1933, that we are immediately concerned here. Since the refunding act was already in existence upon the passage of that law, courts should construe the two existing statutes together in arriving at a construction of the gasoline tax law in its entirety.

APPELLANTS' REPLY TO PROPOSITIONS OF LAW RAISED BY APPELLEE'S POINT V

Appellee under Point V of its Answer Brief argues that Chapter 176, New Mexico Session Laws of 1933, is unconstitutional in so far as it attempts to "domesticate" appellee. In the Propositions of Law, appearing at page 3 of Appellee's Brief, is shown a brief resume of the things required of a distributor by said law.

Appellee correctly states in his brief that this point was properly before the lower court for a decision. We agree to this but submit that the point was decided by the lower court (Tr. 35) as follows:

> "Administrative provisions of the statute, incidentally attacked, seem appropriate to the enforcement of the statute. They do not require plaintiff to do business in New Mexico."

We submit that since no cross appeal was taken by appellee this question is not now properly reviewable in this Court.

As we understand it, appellee's main contention is that it cannot be compelled to take out a distributor's license in the State of New Mexico and to file a bond to secure the payment of the taxes which may become due to the state. The obvious purpose of requiring "distributors" to be

licensed and to post bond is to insure the gasoline taxes being reported and paid to the state. While it is true that the statute complained of requires a copy of the certificate permitting it to do business in New Mexico to be attached to the application for a distributors license, we recognize that this provision could not be applied to appellee engaged only in interstate commerce, and defendants in this case never intended and do not now intend to apply this provision to appellee. The mere fact that the law provides a single act among others which might be unconstitutional as applied to one individual or corporation does not invalidate the main purpose of the act when there is no attempt made to enforce the unconstitutional provision, and appellants' statements to the effect that no attempt will be made to so enforce an unconstitutional provision is sufficient. Clark vs. Poor, 274 U. S. 554, 71 L. Ed. 1199. We realize that this provision was perhaps not sufficiently taken care of in the stipulation of facts for it was stipulated generally that appellants intended to force appellee to comply with the provisions of said Chapter 176. It was not, however, specifically stipulated that the appellants ever intended to compel appellees to "domesticate" within New Mexico and we state now to the Court that it has not ever been and is not now the intention to do this.

The only portion of Chapter 176, Laws of 1933, which will be material to enforce upon appellee with respect to its distributor's license is that it obtain such license and post a bond as provided in the statute to insure the reporting and payment of the amount of taxes due the state. If there are any other provisions in this regard which would be unconstitutional as applied to a corporation or individual engaged strictly in interstate commerce, we have no objection to a decree of injunction enjoining the defendants from attempting to enforce these specific unconstitutional provisions of the act.

CONCLUSION

We therefore submit that the appellee has failed to successfully answer the propositions of law raised by ap-

pellant and that the decision of the lower court should be reversed.

Respectfully Submitted,

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Santa Fe, New Mexico.

J. R. MODRALL,
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Attorneys for Appellants.

APPENDIX "1"

Chapter 96, Laws of 1929

AN ACT RELATING TO EXCISE TAXES UPON SALE OR USE OF GASOLINE AND MOTOR FUEL AND AMENDING SECTION 1 OF CHAPTER 175 OF THE LAWS OF 1921 ENTITLED "AN ACT TO RETROACTIVELY AND PROSPECTIVELY LEVY AN EXCISE TAX ON GASOLINE; PROVIDE FOR THE DISTRIBUTION OF THE PROCEEDS THEREOF, AND TO REPEAL CERTAIN LAWS."

****

Section 6. * * * * The term "Distributor of Gasoline" means a person engaged in the business of selling gasoline or motor fuel in this state from refineries, tank farms, tank cars, receiving tanks or stations or in or from tanks, barrels, drums or other containers in quantities exceeding fifty-six gallons in any one sale and delivery except persons engaged in selling exclusively in interstate commerce.

APPENDIX "2"

Chapter 162, Session Laws of 1933.

AN ACT TO AMEND SECTIONS 1, 2, 3 AND 7 OF CHAPTER 31 OF THE LAWS OF 1931, BEING "AND ACT TO PROVIDE FOR REFUNDING THE EXCISE TAXES PAID ON GASOLINE OR MOTOR FUEL PURCHASED AND USED BY CONSUMER OTHER THAN IN MOTOR VEHICLES OPERATED OR INTENDED TO BE OPERATED ON ANY OF THE PUBLIC STREETS OR HIGHWAYS OF THE STATE OF NEW MEXICO; PROVIDING FOR THE KEEPING OF RECORDS IN CONNECTION THEREWITH, THE EXAMINATION THEREOF AND PENALTIES FOR THE VIOLATION OF ANY OF THE TERMS OF THIS ACT, AND FOR THE REVOCATION OF LICENSES FOR VIOLATIONS THEREOF; AND CREATING A SPECIAL SUS-

PENSE FUND TO CARRY OUT THE PROVISIONS OF THIS ACT."

H. B. No. 230; Approved March 15, 1933.

Be It Enacted by the Legislature of the State of New Mexico:

Section 1. That Section 1 of Chapter 31 of the Laws of 1931, be and the same is hereby amended to read as follows:

"Section 1. That every person, firm, partnership, corporation or association having paid for any one purchase, the excise tax to a distributor or wholesaler upon *fifty* (50) or more gallons of gasoline or motor fuel, which gasoline or motor fuel was purchased and used *solely* and exclusively by such person, firm, partnership, corporation or association other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico, shall be entitled to a refund equal to the amount of tax so paid, upon compliance with the provisions of this Act, and not otherwise."

Sec. 2. That Section 2 of Chapter 31 of the Laws of 1931, be and the same is hereby amended to read as follows:

"Section 2. Every person, firm, partnership, corporation or association desiring to take advantage of the provisions of this act shall at the time of purchase and payment of tax, obtain a receipt for each and every purchase of gasoline or motor fuel from the wholesale dealer or distributor thereof, which receipt shall contain the name of the seller, his address, the name of the purchaser, his address, occupation, the quantity and grade of gasoline or motor fuel purchased, the amount of tax paid, the uses to which the purchaser intends to put such gasoline or motor fuel, the make, horsepower, and other mechanical description of machinery in which the same is to be used, and such other information as may be deemed necessary by the State Comptroller, and such receipt shall be signed in triplicate, two copies of which shall be carbon, by the seller and the purchaser or his or its duly authorized agent or agents.

The forms of receipts shall be furnished by the State Comptroller, upon request, to wholesale dealers or distributors entitled thereto, and shall be printed in colors, the original to be retained by the seller or distributor as herein provided shall be green in color and the duplicate and triplicate may be of any other colors so as to make the same easily distinguishable. After the due execution of said receipts as herein provided, the seller shall return the duplicate to the purchaser and shall deliver the original green copy within thirty days to the State Comptroller. *Provided, further, that the seller shall color black all such gasoline or motor fuel at the time of sale and purchase, which coloring shall be furnished by the State Comptroller, without cost to all sellers, and it shall be unlawful for any one to use such colored gasoline or motor fuel in any motor vehicle operated or intended to be operated upon any of the public streets or highways of the State of New Mexico; providing, however, that any person, firm, partnership, corporation or association operating a clothes cleaning establishment may, upon proper showing, purchase gasoline which shall not be colored as herein required.*

Sec. 3. That Section 3 of Chapter 31 of the Laws of 1931, be and the same is hereby amended to read as follows:

"Section 3. Upon the payment of the tax thereon, and at any time within four months after the date of the first purchase of any portion of the gasoline or motor fuel constituting any portion of the *100* gallons for which refund may be claimed under the provisions of this Act, the purchaser may file an affidavit to be attached to the receipt returned to him, as provided in Section 2 of this Act, which affidavit shall be sworn to under oath by the claimant before an officer authorized to administer oaths and shall state the quantity of such motor fuel so purchased and used by said claimant other than in motor vehicles operated or intended to be operated upon any of the public streets or highways of the State of New Mexico, with the State Comptroller requesting therein a refund of the tax paid; *Provided,* applications shall in no event be considered

or allowed upon a total quantity of less than *one* hundred gallons of gasoline or motor fuel. For the purpose of carrying out the provisions of this Act, the receipt, when attached to said affidavit, shall become a part thereof and shall be interpreted as such and have that effect. The said State Comptroller, upon presentation of said affidavits and receipts duly executed, shall cause to be refunded to said claimant consumer, from the gasoline or motor fuel taxes collected, an amount equal to the gasoline or motor fuel taxes paid by said claimant consumer on the gasoline or motor fuel so purchased and used. No application filed after the four months' period prescribed in this Section shall be considered for any purpose by the State Comptroller or the treasurer of the State of New Mexico."

Sec. 4. That Section 7 of Chapter 31 of the Laws of 1931, be and the same is hereby amended to read as follows:

"Section 7. Any person, firm, partnership, corporation, association or any officer or agent thereof, acting either as seller or purchaser, or in their behalf, who wilfully gives, signs or executes a false receipt or aids in the falsifying of a receipt, as provided for in this Act, or who wilfully fails to keep a full and complete record as in this Act provided, *or who fails or refuses to color the motor fuel or gasoline as required by this Act or who uses such colored gasoline or motor fuel in any motor vehicle operated or intended to be operated upon the public streets or highways of this State,* shall be guilty of a felony and shall be punished by a fine of not less than five hundred ($500.00) dollars nor more than one thousand ($1,000.00) dollars, or by imprisonment in the state penitentiary for not less than one nor more than two years, or by both such fine and imprisonment."

APPENDIX "3"

Chapter 154, Laws of 1919. (Sec. 64-316, Compilation of 1929.)

AN ACT TO AMEND SECTIONS 15 and 16 of CHAPTER 38 OF THE SESSION LAWS OF 1917, BEING AN ACT RELATING TO PUBLIC HIGHWAYS AND BRIDGES.

* * * * Subject to the provisions of Section 4579 (109-205), New Mexico Statutes, Codification of 1915, after providing for interest and sinking fund upon state highway bonds authorized and issued in accordance with Chapter 58 of the Session Laws of 1912 by setting aside sufficient funds therefor each year out of the proceeds of the said one mill tax levy or out of moneys received from sales of certificates or debentures issued in anticipation thereof, it shall be the duty of the state treasurer to set aside from the moneys received from collection of the taxes and licenses pledged therefor sufficient funds to provide for the payment of the interest and principal of all certificates or debentures issued under the provisions of this act.

There shall next be reserved from the state road fund a sufficient sum annually based upon estimates by the state highway engineer, to cover all expenses of the commission, salaries of officers and employees, and to pay the state's portion of the cost of maintaining the system of state highways herein provided for. The balance of the moneys in the state road fund shall be used as the commission shall determine for co-operating with the United States government or with the several counties or municipalities of the state or otherwise, in the discretion of the commission, for the construction, improvement, or maintenance of public highways and bridges.

APPENDIX "4"

Chapter 144, Laws of 1931.

AN ACT RELATING TO STATE HIGHWAY DEBENTURES.

* * * *

Section 1. The State Highway Commission of the State of New Mexico is hereby authorized to anticipate the proceeds of the collection of any or all of the gasoline excise taxes, motor vehicle registration fees and property and other taxes to the extent to which it is provided by law that the proceeds of the collection of such fees and taxes shall be covered into the State Road Fund and to the extent that the same are not otherwise pledged by the issuance and sale of bonds or debentures heretofore sold and now outstanding, by the issuance and sale of state highway debentures in such amounts, not exceeding in the aggregate TWO MILLION Dollars ($2,000,000.00), at such times and bearing such rate of interest, not exceeding six per centum per annum, as said Commission may determine; provided, that not to exceed in the aggregate Two Million Dollars ($2,000,000.00) par value of such debentures shall be issued either under authority hereof or other authority, and that no such debentures shall be issued after December first, 1932.

Said debentures shall be issued in serial form and mature at stated periods not exceeding ten years from the date of issuance.

Said debentures shall be signed by the President of said Commission, attested by its Secretary, with the seal of the Commission thereunto affixed, and shall be countersigned by the Treasurer of the State of New Mexico, and may have coupons attached bearing the facsimile signature of the Treasurer of the State of New Mexico for semi-annual instalments of interest.

* * * *

Sec. 3. Said debentures shall be sold by the State Board of Finance to the highest bidder for cash at not less than par and accrued interest at such times and in such amounts as may be determined by said Commission after advertising the time and place of sale by notice published for four consecutive weeks in one newspaper published in the city of Santa Fe, State of New Mexico and one newspaper published in the city of New York, State of New York, the first publication to be not less than thirty days prior to the date of sale.

At the time and place stated in said notice, the said Board of Finance shall open the bids in public and may award said debentures to the bidder or bidders offering the highest price, not less than par and accrued interest, or offering to purchase said debentures at par and accrued interest at the lowest rate of interest.

Said Board shall require as security for compliance with the terms of each bid the deposit of a certified check equal to two per centum of the amount of the bid, on some solvent bank or trust company, payable to the order of the Treasurer of the State of New Mexico, as a guaranty that the debentures will be paid for by the bidder, to be forfeited in case the bidder fails to pay for the debentures in accordance with his bid, if the debentures be awarded to him.

The cost of such advertisement shall be paid out of the State Road Fund upon warrant issued by the State Auditor. The proceeds of the sale of said debentures shall be paid into the State Treasury, shall be covered into the State Road Fund and shall be used and disbursed in the same manner as other monies in said fund.

* * * *

APPENDIX "5"

Chapter 30, Session Laws of 1933.

AN ACT RELATING TO STATE HIGHWAY DEBENTURES.

Section 1. The State Highway Commission of the State of New Mexico is hereby authorized to anticipate the proceeds of the collection of any or all of the gasoline excise taxes, motor vehicle registration fees and property and other taxes to the extent to which it is provided by law that the proceeds of the collection of such fees and taxes shall be covered into the State Road Fund and to the extent that the same are not otherwise pledged by the issuance and sale of bonds or debentures heretofore sold and now outstanding, by the issuance and sale of state highway debentures in such amounts, not exceeding in the aggregate *Two Million* Dollars ($2,000,000.00), at such times and bearing

such rate of interest, not exceeding six per centum per annum, as said Commission may determine; *Provided,* that not to exceed in the aggregate Two Million Dollars ($2,000,000.00) par value of such debentures shall be issued either under authority hereof or other authority, and that no such debentures shall be issued after December first, 1934.

Said debentures shall be issued in serial form and mature at stated periods not exceeding ten years from the date of issuance.

Said debentures shall be signed by the President of said Commission, attested by its Secretary, with the seal of the Commission thereunto affixed, and shall be countersigned by the Treasurer of the State of New Mexico, and may have coupons attached bearing the fac-simile signature of the Treasurer of the State of New Mexico for semi-annual instalments of interest.

* * * *

Sec. 3. Said debentures shall be sold by the State Board of Finance to the highest bidder for cash at not less than par and accrued interest at such times and in such amounts as may be determined by said Commission after advertising the time and place of sale by notice published for four consecutive weeks in one newspaper published in the city of Santa Fe, State of New Mexico and one newspaper published in the city of New York, State of New York, the first publication to be not less than thirty days prior to the date of sale.

At the time and place stated in said notice, the said Board of Finance shall open the bids in public and may award said debentures to the bidder or bidders offering the highest price, not less than par and accrued interest, or offering to purchase said debentures at par and accrued interest, or offering to purchase said debentures at par and accrued interest at the lowest rate of interest.

Said Board shall require as security for compliance with the terms of each bid the deposit of a certified check equal to two per centum of the amount of the bid, on some solvent bank or trust company, payable to the order of the Treasurer of the State of New Mexico, as a guaranty that the debentures will be paid for by the bidder, to be forfeited in case the bidder fails to pay for the debentures in

accordance with his bid, if the debentures be awarded to him.

The cost of such advertisement shall be paid out of the State Road Fund upon warrant issued by the State Auditor. The proceeds of the sale of said debentures shall be paid into the State Treasury, shall be covered into the State Road Fund and shall be used and disbursed in the same manner as other monies in said fund.

* * * *

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 520

JOHN D. BINGAMAN, AS COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO, ET AL.,

Appellants,

vs.

GOLDEN EAGLE WESTERN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM.

E. R. WRIGHT,
EARL A. BAGBY,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 520

JOHN D. BINGAMAN, AS COMMISSIONER OF REVENUE OF THE STATE OF NEW MEXICO, ET AL.,

Appellants,

vs.

GOLDEN EAGLE WESTERN LINES, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

MOTION TO AFFIRM.

Filed October 4, 1935, Nunc pro Tunc as of August 30, 1935.

Now comes the appellee in the above entitled cause and moves that the judgment of the three-judge court, entered on the 9th day of August, 1935, be affirmed, and for grounds of motion shows the Court:

1. It appears from the pleadings and the stipulated facts that the challenged statutes impose an excise tax on the privilege of engaging in interstate commerce.

2. The challenged statutes having been construed by the Supreme Court of the State of New Mexico as imposing an excise tax on the use of gasoline, and not as compensation for the use of a State facility, to-wit, the State highways of the State of New Mexico, the Federal courts are bound by the construction placed upon the act by the State Supreme Court, and must follow such construction, as was definitely held in the three-judge court opinion in this case.

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STATEMENT OF APPELLEE IN OPPOSITION TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

Filed October 4, 1935, Nunc pro Tunc as of August 30, 1935.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

This statement in opposition to the jurisdiction of the Supreme Court of the United States is filed pursuant to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court.

I.

The period covered by this litigation runs from April, 1932, to the present time. There are two challenged State statutes:

Chapter 29, New Mexico Session Laws, 1929, Sec. 60-101, New Mexico Statutes Annotated, Compilation of 1929, which is as follows:

> "There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this State for any purpose; provided, that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this State by distributors or dealers upon the sale of the gasoline so used."

The title to this statute provides:

> "An Act to Amend Section 1 of Chapter 14 of the Laws of 1927, Providing for an Excise Tax on the Use of Gasoline."

The title to said Chapter 14 of the Laws of 1927 reads as follows:

> "An Act Providing for an Excise Tax upon the Use of Gasoline and Motor Fuel."

This was the applicable statute from April, 1932, to the effective date of the 1933 Act, Chapter 176 of the Session Laws of 1933, which Act was entitled:

> "An Act to Codify and Revise the Gasoline and Motor Fuels Excise Tax Laws; to Define Gasoline and Motor Fuels and other Terms; to Levy an Excise Tax of Five Cents Per Gallon; to Provide for the Licensing of All Distributors and Retail Dealers and Bonding of Distributors; to Provide for Reports from Distributors, etc."

The specific section of the Act involved in this case reads as follows:

> "There is hereby levied and imposed an excise tax of five cents (5¢) per gallon upon the sale and use of all gasoline and motor fuel sold or used in this State for any purpose, except gasoline sold in interstate commerce."

This statute became effective the 12th day of June, 1932, and is still in effect.

Pertinent State statutes having a bearing on the constitutionality of the challenged statutes are Chapter 129 of the Session Laws of 1929, entitled:

> "An Act Relating to the Supervision and Regulation of the Business of Operating Motor Vehicles as Common Carriers upon the Public Highways, and Prescribing Compensation to be Paid for the Use of Such Highways in Carrying on Such Business."

This Act provides generally for the regulation of common carriers, provides for either a certificate of registration or

a certificate of public convenience and necessity, and fixes and prescribes the fees to be paid for the use of the highways on the basis of a mileage tax determined by the carrying capacity of the particular vehicle.

The language of Section 7 (Sec. 11-1007, 1929 Compilation) reads as follows:

> "In addition to the regular license fees and taxes imposed upon motor vehicles, there shall be paid by and collected from every motor vehicle carrier, except those specifically excluded from the provisions of this act, the following charges as compensation for the use of the public highways and the maintenance, repair and reconstruction of the same."

This Act was in effect until March 15, 1933.

Chapter 154 of the Session Laws of 1933, entitled:

> "An Act Relating to the Supervision and Regulation of the Business of the Transportation by Motor Vehicles for Hire Over the Public Highways of the State of New Mexico; Prescribing the Compensation for the Use of Such Highways and Carrying on Such Business and Repealing Such Parts of Chapter 129, Laws of New Mexico of 1929, Chapter 52, Laws of New Mexico of 1931, and All Other Laws of the State of New Mexico as Are in Conflict Herewith."

This Act is a codification and revision of Chapter 129 of the Session Laws of 1929, and includes, in addition to common carriers, contract carriers, and provides for the issuance of certificates of registration and/or certificates of public convenience and necessity, prescribes the fees and fixes a mileage tax to be paid by contract and common carriers.

The language of Section 39 provides:

> "In addition to the regular license fees and taxes imposed upon motor vehicles, there shall be assessed against and collected from every such carrier, for the administration of this act and for the maintenance, repair and reconstruction of public highways, a mileage tax which shall be imposed as follows:"

This Act became effective March 15, 1933, and is still in effect.

Chapter 31 of the Session Laws of 1931, entitled:

> "An Act to Provide for Refunding the Excise Tax Paid on Gasoline and Motor Fuel Purchased and Used by Consumers Other than in Motor Vehicles Operated or Intended to Be Operated on Any Public Streets or Highways of the State of New Mexico," etc.

This Act merely provided for a system of refunds to those purchasing gasoline from licensed distributors within the State of New Mexico where the gasoline was *not* used in the operation of motor vehicles on the public highways.

We have cited and quoted the various statutes of the State of New Mexico pertinent to this inquiry because of the decision rendered by the Supreme Court of the State of New Mexico on March 31, 1930, in the case of *Breece Lumber Company* v. *Mirabal*, 34 N. M. 643, 287 P. 699, affirmed by the Supreme Court of the United States at 283 U. S. 788.

II.

The Nature of the Case.

The appellants, in the Statement of Jurisdiction, under subheading C, "Nature of the Case", take the position:

> "The only question really involved in the case is whether or not the laws of the State of New Mexico

levy a tax on gasoline bought by an interstate carrier outside of the State of New Mexico and placed in the vehicles of the interstate carrier outside of the State of New Mexico and used for the propulsion of said vehicles over the highways of the State of New Mexico."

And again, under sub heading D, "Cases Sustaining Jurisdiction", counsel for the appellants repeat the statement, coupled with the assertion that the decisions cited under said sub-division are believed by counsel to sustain the jurisdiction of this Court on this appeal.

With this assertion as to the scope of the question involved, counsel for the appellee cannot agree. By referring to the complaint in this case and to the stipulated facts it will be noted that the plaintiff bus company, appellee here, raises two major questions:

First, whether or not, in any case, an excise tax may be lawfully levied upon interstate commerce as distinguished from a toll or rental charge for the use of a State facility.

As an excise tax on the privilege of use, the facts in the case at bar bring the case squarely within the doctrine of *Helson and Randolph* v. *Kentucky,* 279 U. S. 245.

The toll or rental theory for the use of a State facility is clearly set out in the following cases:

Parkersburg and Ohio River Transportation Co. v. *Parkersburg,* 107 U. S. 691;
Huse v. *Glover,* 119 U. S. 543;
Monongahela River Co. v. *United States,* 148 U. S. 312;
Minn. Rate cases, 230 U. S. 352.

All of which cases are cited by the Supreme Court of the United States in the opinion in the case of *Hendrick* v. *Maryland,* 235 U. S. 610.

Second: Can the tax imposed by Chapter 29 of the New Mexico Session Laws of 1929, or Chapter 176 of the Session

Laws of 1933, be sustained as a charge for the use of State facilities, rather than an excise tax on the privilege of interstate commerce?

Interstate Transit, Inc. v. *Lindsey,* 283 U. S. 183.

Chapter 29 of the New Mexico Session Laws of 1929, Sec. 60-101 of the New Mexico Statutes, Annotated, Compilation of 1929, was directly construed by the New Mexico Supreme Court in the case of *Breese Lumber Company* v. *Mirabal,* 287 P. 699, affirmed 283 U. S. 788. In the case last cited the court specifically held that the 1929 Act was an excise tax and not compensation for the use of the highways. On rehearing in this case, attention was called to Chapter 31 of the Session Laws of 1931, being the gasoline and motor fuel refund act. The court held that this Act did not change the character of the gasoline tax statute, and adhered to its position that it was an excise tax and not compensation for the use of the highways.

The language of Chapter 176 of the Session Laws of 1933 is identical with the earlier act. This position was reiterated in the case of *Transcontinental Air Co.* v. *Lujan,* 8 P. (2d) 103.

The statute, having been construed by the New Mexico Supreme Court, the Federal court is bound to follow the Supreme Court's interpretation and construction of the Act.

Terry v. *Midwest Refining Co.,* 64 F. (2d) 428;

Warburton v. *White,* 176 U. S. 484;

Jones v. *Prairie Oil and Gas Co.,* 273 U. S. 195.

Third: In addition to the two major questions submitted, appellee calls the Court's attention to the complaint in this case and to paragraph nine of the stipulated facts, which present an additional question squarely presented by the pleadings, which, however, was not directly ruled upon by the three-judge court, in view of the holding of the court to

the effect that the tax imposed by the Act was an excise tax imposed upon an interstate commerce, and, therefore, void.

The pleadings and the stipulated facts also present other incidental questions which will be properly raised if the case is heard upon the issues presented by the pleadings and the facts.

Respectfully submitted,

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Attorneys for Appellee.

(6996-C)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

GOLDEN EAGLE WESTERN LINES, INC., a corporation,

vs, Appellee,

JOHN D. BINGAMAN, as Commissioner of Revenue of the State of New Mexico; JUAN N. VIGIL, as State Comptroller of the State of New Mexico; FRANK H. PATTON, as Attorney General of the State of New Mexico; JUANITA HILL, as State Gasoline Tax Collector of the State of New Mexico, and CLYDE TINGLEY, as Governor of the State of New Mexico,

Appellants.

No. 529

BRIEF OF APPELLEE

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SANTA FE NEW MEXICAN PUBLISHING CORP.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

GOLDEN EAGLE WESTERN LINES, INC., a corporation,

Appellee,

vs,

JOHN D. BINGAMAN, as Commissioner of Revenue of the State of New Mexico; JUAN N. VIGIL, as State Comptroller of the State of New Mexico; FRANK H. PATTON, as Attorney General of the State of New Mexico; JUANITA HILL, as State Gasoline Tax Collector of the State of New Mexico, and CLYDE TINGLEY, as Governor of the State of New Mexico,

Appellants.

No. 520

BRIEF OF APPELLEE

STATEMENT OF FACTS

Appellee accepts appellants' statement of facts, with the following supplemental statement:—

Plaintiff, appellee here, is a corporation organized under the laws of the State of Delaware and has never qualified to do business in the State of New Mexico.

STATEMENT OF THE CASE

From the allegations of the complaint, it appears that the State of New Mexico, acting through the officials named as defendants, demands, under authority of Chapter 176 of the New Mexico Session Laws of 1933, that the plaintiff

corporation become a licensed distributor, paying license fees and furnishing bond, and in addition thereto pay an excise tax on all gasoline used by the plaintiff corporation in operating its busses in interstate commerce through the State of New Mexico. The gasoline used by the plaintiff is purchased outside of the State of New Mexico, placed in the tanks of the busses outside of the State of New Mexico, and used to operate the busses over the highways of the State of New Mexico in interstate commerce solely.

The decree entered in the case by the Three-Judge Court (Tr. 41-43) enjoins the defendants, appellants here, from enforcing the provisions of Chapter 176 of the New Mexico Session Laws of 1933, so far as it relates to gasoline or other motor fuel purchased by the plaintiff outside of the State of New Mexico and used in its vehicles for the propelling of the same in interstate commerce within the State of New Mexico, and generally from enforcing said statute in any manner against the plaintiff or its predecessors in interest by reason of such use of gasoline or other motor fuel within the State of New Mexico.

In other words, while the majority opinion of the Court makes no direct reference to the threat made by officials of the State of New Mexico to require the plaintiff to take out a distributor's license, as required under Chapter 176 of the New Mexico Session Laws of 1933, this question is presented by the pleadings and was before the Three-Judge Court, and is included within the terms of the decree of injunction entered in this cause.

PROPOSITIONS OF LAW

The Attorney General, at Page 2 of his brief, in stating the propositions of law involved in this case, makes no mention of the attempt of the state to compel the plaintiff Golden Eagle Western Lines, Inc., a Delaware corporation, to take out a license as a distributor under the provisions of Chapter 176 of the New Mexico Session Laws of 1933. We submit that, in addition to the propositions of law set out at pages 2 and 3 of the Attorney General's brief, the following additional question must be passed upon in order to fully dispose of the case, namely:—

The State of New Mexico is without power to require the appellee corporation, engaged exclusively in interstate commerce to become a licensed distributor and to either—

1. file a certified copy of its articles of incorporation,
2. file a "statement" as to its capital stock,
3. file a "statement" as to the character of its business,
4. designate a principal office,
5. designate a resident agent upon whom process might be served,
6. pay fees, original or annual, for license to exercise corporate power,
7. be barred from rights to sue in state or other courts unless "licensed", or to
8. be subject to civil or criminal penalties for not being "licensed",

all as required under the provisions of Chapter 176, New Mexico Session Laws of 1933 (See Appendix "G"), and as threatened by the defendants.

MATERIAL STATUTORY AND CONSTITUTIONAL PROVISIONS

At pages 3 to 6 of the Attorney General's brief, appear excerpts from various statutes of New Mexico, which the Attorney General submits are material to the determination of the issues in this case.

Counsel for the appellee feel that a somewhat more extensive statement of the statutory provisions involved, including titles to several of the acts, is necessary to a thorough understanding of the situation, and as some of these acts are rather lengthy, we have included them in the appendix, identifying them as Appendix "A" to Appendix "J" inclusive.

Chapter 29, New Mexico Session Laws of 1929, referred to at page 3 of the Attorney General's brief, appears as Appendix "F".

Section 60-203, New Mexico Statutes Annotated, Compilation of 1929, referred to at pages 3 and 4 of the Attorney General's brief, appears as Appendix "D", Section "1".

Chapter 31 of the New Mexico Session Laws of 1931, referred to at page 4 of the Attorney General's brief, appears as Appendix "H".

Chapter 176 of the Session Laws of 1933, referred to at page 5 of the Attorney General's brief, appears as Appendix "G".

Section 60-205, New Mexico Statutes Annotated, Compilation of 1929, appears as Section 2 of Chapter 20, New Mexico Session Laws of 1927—Appendix "D".

In addition to these statutes and because of the fact that some of them are referred to in the dissenting opinion, we have included herein, as Appendix "A", Chapter 93 of the New Mexico Session Laws of 1919, which is the first gasoline tax act in effect in New Mexico, and the one construed by this Court in the cases of *"Askren v. Continental Oil Company,"* 252 U. S. 444, and *"Bowman v. Continental Oil Company,"* 256 U. S. 642. This act imposed the tax upon the *sale* or *use* of gasoline.

Appendix "B" is Chapter 175 of the Session Laws of 1921, which levied an excise tax merely on the *sale* of gasoline.

Appendix "C", Chapter 61 of the New Mexico Session Laws of 1925, imposed an excise tax on the *sale* of gasoline.

Appendix "D", Chapter 20, Session Laws of 1927, imposes an excise tax on the *sale* of gasoline, and provides for the use of the proceeds of the tax.

Appendix "E", Chapter 14, Session Laws of 1927, imposes an excise tax on the *use* of gasoline, with provision for the allowance of credit where the tax had already been paid upon the sale of gasoline.

Appendix "F", Chapter 29 of the Session Laws of 1929, amends the provisions of Chapter 14, Session Laws of 1927, Appendix "E".

Appendix "I", Chapter 129 of the Session Laws of 1929, sets forth the pertinent portions of the act, providing for the regulation of motor vehicles operated as common carriers on the highways of the State of New Mexico.

Appendix "J", Chapter 154, New Mexico Session Laws of 1933, sets forth the pertinent provisions of the 1933 act for the supervision and regulation of the business of

transportation by motor vehicle for hire over the public highways of the State of New Mexico.

In addition to these provisions of the statute, we deem the following Constitutional provisions pertinent:—

ARTICLE IV—NEW MEXICO CONSTITUTION

> Sec. 16. The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not expressed shall be void. * * * * *
>
> Sec. 18. No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full.

Beginning at an early date, the state of New Mexico also required annual registration fees for motor vehicles using the public highways within the state, these fees being credited to the state, county and municipal road funds.

INTRODUCTORY ARGUMENT

Before entering into consideration of the four points made in the brief of the Attorney General, the appellee desires to state its position in the light of Federal decisions.

The appellee contends that the gasoline use tax cannot be construed as a statute exacting compensation for use of the state highways for the following reasons:—

1. The excise tax in issue is *not* a toll or rental, nor is it any other form of direct charge for use of state facilities. Cases illustrative of this distinction are:—

Parkersburg Transp. Co. vs. Parkersburg, 107 U. S. 691

Huse vs. Glover, 119 U. S. 543, 548

Monongahela Nav. Co. vs. United States, 148 U. S. 312

St. Louis vs. Western Union Tel. Co. 148 U. S. 92, 97-101
Postal Tel-Cable Co. vs. Baltimore. 156 U. S. 210
Carley & Hamilton vs. Snook, 281 U. S. 66
Nashville C & St. L. Ry vs. Wallace, 288 U. S. 249.

The rule announced in the case of *Helson and Randolph vs. Kentucky,* 279 U. S. 245 applies so that gasoline purchased and placed in the tanks of plaintiff's vehicles outside of the state of New Mexico may not have the excise tax applied to the proportion thereof used in the State of New Mexico, regardless of whether such tax is intended as compensation for use of state highways.

Plaintiff contends that such excise tax is levied on the use of facilities in interstate commerce and is unconstitutional under the commerce clause regardless of the purposes to which the tax money is devoted.

A state charge against a carrier in interstate commerce has been justified under some conditions by way of *tolls* or *rentals,* and as such, are said to not unduly burden interstate commerce. Such taxes or fees are direct charges exacted for compensation for use of state facilities. Such charges are subject to test as to reasonableness of amount for the direct purpose specified. Such *direct* charges are sometimes said to be an *indirect* burden on interstate commerce. Cases of this character are as follows:—

A city constructed a wharf and charged fees applicable to intrastate and interstate carriers for the use thereof. In distinguishing *Cannon vs. New Orleans,* 20 Wall 577, which held a tax statute unconstitutional, the court indicated the basis of its decision sustaining the constitutionality of "wharfage fees". It was said:

> "The one (tonnage duty) is imposed by the government, the other (wharfage fees) by the owner of the wharf or landing. The one is a commercial regulation, dictated by the general policy of the country upon consideration having reference to its commerce or revenue (hence invalid); the other is a *rent* charged by the owner of the property for its temporary use."

(underscoring ours) *Parkersburg Transportation Co. vs. Parkersburg,* 107 U. S. 691.

See also as to canal lock tolls it was said:

> "The exaction of tolls for passage through the locks is as compensation for the use of artificial facilities constructed, not as an impost upon the navigation of the stream. . . . . For outlays caused by such works (improving navigability) the state may exact reasonable charges for the use of warves and locks constructed to facilitate the landing of persons and freight, and the taking them on board, or for the repair of vessels." See *Huse vs. Glover,* 119 U. S. 543, 548.

To the same effect, and quoting the above from the Huse case with approval see *Monongahela Navigation Co. vs. United States,* 148 U. S. 312.

In the case involving a municipal charge against a telegraph company erecting poles therein it was held that such charge was not a privilege or license tax. The court said:

> "It is more in the nature of a charge for the use of property belonging to the city—that which may be properly called rental. 'A tax is a demand of sovereignty; a toll is a demand of proprietorship'." See *St. Louis vs. Western Union Tel Co.,* 148 U. S. 92, 97-101.

See also to same effect, *State Freight Tax Case,* 15 Wall, 232, 278.

The Supreme Court explained its reasons for sustaining the constitutionality of an ordinance in the following words:

> "The use which the defendant makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in vehicle, passes to and fro along the streets and his use and occupation thereof are temporary and shifting. The

space he occupies one moment he abandons the next to be occupied by another traveler. This use is common to all members of the public, and it is open equally to citizens of other states with those of a state in which the street is situate. But the use made by the telegraph company in respect to so much of the space as it occupies with its poles, is permanent and exclusive. . . . . All that we desire or need to notice is the fact that this case is an absolute permanent and exclusive appropriation of that space in the streets which is occupied by telegraph poles. To that extent it is a use different in kind and extent from that enjoyed by the general public. . . . . When an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or a corporation of the same or another state, or a corporation of the National Government, it is within the competency of the state, representing the sovereignty of that local public, to exact for its benefit compensation for this *exclusive appropriation.* It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." (underlining ours) See *St. Louis vs. Western Union Tel Co.* 148 U. S. 92. 97-101.

An almost identical decision to that last above quoted from is found in *Postal Tel-Cable Co. vs. Baltimore,* 156 U. S. 210.

But a gasoline tax is not a toll for the use of the highways. This was specifically decided in *Carley & Hamilton vs. Snook,* 281 U. S. 66, and *Nashville C & St. L. Ry vs. Wallace,* 288 U. S. 249. In the last cited case the railroad company used the gasoline exclusively for the operation of equipment on its own right of way and complained that the tax was levied as a charge for the use of the highways (which it did not use), this being the same contention that is now made by the State of New Mexico in the instant case.

But the court said: "But the levy is a tax, not a toll or charge for use of the highways."

The Attorney General lays much stress on decisions holding that states may levy a tax on instrumentalities of interstate commerce as compensation for the use of state facilities, citing the case of Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, and the several cases referred to on page 10 of his brief.

It is our contention that a careful analysis of these cases, which we have cited, discloses that such statutes, to be constitutional in the face of the commerce clause, must be by way of the exaction of a toll or a charge that is compensation directly to the state, and that expressions in some of the cases which are apparently in conflict with this proposition, must be considered as "dicta". When these cases are analyzed we think it clear that a tax statute to be applicable to instrumentalities of interstate commerce must clearly be by its terms one that does not tax for general purposes, but taxes for the specific purpose of securing compensation for the use of state facilities involved in the tax statute itself. As stated before, such a "tax" is not properly an "excise tax", but is a charge or rental for the use of the state properties or facilities.

2. The excise tax in issue is *not* exacted pursuant to an exercise of the police power in the interest of the health, safety, morals and welfare of the citizens of the State, nor is it for police regulation or defraying of costs concerning the same. The statute is not regulatory in nature. It is purely a revenue measure. Cases illustrative of this distinction are:

Clark vs. Poor, 275 U. S. 554
Minnesota Rate cases, 230 U. S. 352, 401
Hendrick vs. Maryland, 235 U. S. 610
Kane vs. New Jersey, 242 U. S. 160
Hess vs. Pawloski, 274 U. S. 352
Morris vs. Duby, 274 U. S. 135
Interstate Busses Corp. vs. Blodgett, 276 U. S. 245
Helson & Randolph vs. Kentucky, 279 U. S. 245
Sprout vs. City of South Bend, 277 U. S. 163

3. The excise tax as here levied is a privilege or occupation tax and is levied on the *use* of a facility in interstate commerce, and is, therefore, void under the commerce clause.

Helson & Randolph vs. Kentucky, 279 U. S. 245
Breece Lumber Co. vs. Mirabal, 34 N. Mex. 643, 287 Pac. 699, Affirmed 283 U. S. 688
Transcontinental & Western Air, Inc. v. Lujan, 36 N. Mex. 64, 8 Pac. (2nd) 103
Mid-Continent Air Express Corp. vs. Lujan, 47 F (2nd) 266
Bowman vs. Continental Oil Co., 256 U. S. 242
In Re Wilson, 10 N. Mex. 32; 60 Pac. 73; 48 L. R. A. 417
Monamotor Oil Co. vs. Johnson, 292 U. S. 86; 93-95
Eastern Air Transport vs. Tax Commission, 285 U. S. 147, 153
Central Transfer Co. vs. Commercial Oil Co. 45 F (2nd) 400, 402
American Airways vs. Wallace, 57 F (2nd) 877, 880
Western Air Transport vs. South Carolina Tax Commission, 52 F (2nd) 456, 459
Gloucester Ferry Co. vs. Pennsylvania, 279 U. S. 245
Leloup vs. Port of Mobile, 117 U. S. 640
Adams Express Co. vs. Ohio, 166 U. S. 185-218
United Airways vs. Shaw, 43 F (2nd) 148
Boeing Air Transport v. Edleman, 289 U. S. 249
Cooney vs. Mountain States Tel & Tel Co. 294 U. S. 384; 55 Sup. Ct. Rep. 477

4. Such an excise tax levied on the use of a facility in interstate commerce is void, regardless of the purpose for which it is enacted or the application made or to be made of the funds to be derived therefrom; nor does the constitutionality thereof depend upon enjoyment by the tax payer of any special benefit from said funds. Hence even though said statute could be considered one exacting compensation for use of state facilities, it is nevertheless unconstitutional under the commerce clause.

Western Union Tel Co. v. Kansas, 216 U. S. 1, 19-24
Cobb vs. Dept. of Public Works, 60 F. (2nd) 631, 640
Crutcher vs. Kentucky, 141 U. S. 47
Breece Lumber Co. vs. Mirabal, 34 N. Mex. 643, 287 Pac. 699, affirmed 283 U. S. 788
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Helson & Randolph vs. Kentucky, 279 U. S. 245
Varney Air Lines vs. Babcock (D. C.) 1 Fed. Supp. 687

5. The legislative history of the statutes in question and the interpretations thereof by the highest courts of the State of New Mexico, and by the Federal Courts, conclusively prevent any presumption or assumption that the gasoline excise tax statute was enacted for the purpose of securing compensation unto the state for the use of its highways. Nor does the enactment of the refund statute serve in any manner to change the situation.

Askren v. Continental Oil Co. 252 U. S. 444.
Bowman vs. Continental Oil Co., 256 U. S. 642
Breece Lumber Co. vs. Mirabal, 34 N. Mex. 643, 287 Pac. 699
Transcontinental & Western Air vs. Lujan, 36 N. Mex. 64, 74, 8 Pac. (2nd) 103
Mid-Continent Air Express Corp. vs. Lujan, 47 Fed (2nd) 266

APPELLEE'S REPLY TO APPELLANTS' POINT I

As we read appellants' brief, counsel admit under Points I and II that the New Mexico acts levying and im-

posing the excise tax of five cents per gallon upon the use of all gasoline used within the state for any purpose, except gasoline sold in interstate commerce, should be construed as excise taxes upon the use of such gasoline and not as compensation for the use of the public highways, were it not for the provisions of Chapter 31, 1931 Session Laws of New Mexico, and the amendments thereto. This most certainly was the holding of the Supreme Court of New Mexico in the cases of *"Breece Lumber Co. v. Mirabal,"* 34 N. M. 643, 287 P. 699, and *"Transcontinental and Western Air, Inc. vs. Lujan,"* 36 N. M. 64; 8 P. (2nd) 103. It is also the construction placed by this court upon the earlier act, Chapter 93, New Mexico Session Laws of 1919 (which act does not differ in effect from the later acts here involved).

Askren vs. Continental Oil Co., 252 U. S. 444
Bowman vs. Continental Oil Co., 256 U. S. 642.

At pages 8 and 9 of appellants' brief appears a reference to the stipulation entered into by counsel (Paragraph XII, page 32 Tr.).

It will be noted that the stipulation is merely to the effect that the taxes collected under the two laws in question are distributed and used by the State of New Mexico in accordance with the provisions of Section 60-205 of the New Mexico Statutes Annotated, Compilation of 1929.

As a matter of fact the taxes are so distributed and used notwithstanding the fact that Section 60-205 of the New Mexico Statutes Annotated, Compilation of 1929 (page 9 appellants' brief and Appendix "D", Sec. 2), does not in fact govern the distribution and use by the State of New Mexico of any taxes collected by the state under the *use* tax, as the section in question (Appendix "D", sec. 2 which is amendatory of Chapter 175, New Mexico Session Laws of 1921, Appendix "B") only provides for the distribution and use of the proceeds of the *sales* tax as distinguished from the *use tax*. At the time of the passage of Chapter 175, New Mexico Session Laws of 1921 (Appendix "B") and of Chapter 61, New Mexico Session Laws of 1925 (Appendix "D") (notwithstanding the fact that on the same

date there was approved an independent act imposing a use tax, Chapter 14, Session Laws of 1927) there was no such thing as a use tax in the State of New Mexico, and since that date no new act has been passed disposing of the proceeds either of the sales tax or the use tax. Chapter 176, Session Laws of 1933 (Appendix "G") Section 13, provides:—

> "The excise tax of five cents (5c) per gallon on motor fuel and gasoline as herein levied and provided for (this includes both the sales and use tax levied by the provisions of this act) shall be distributed as now or hereafter provided by law."

It follows from the foregoing that during all of the times material to this discussion, there has been upon the statute books of New Mexico no statute allocating the proceeds of the *use tax* to highway purposes. Paragraph XII of the stipulation of facts merely stipulates that the proceeds of the use tax have been as a matter of practice, by the administrative officers of the state, allocated to highway purposes and so used by the state. It follows as a matter of law, therefore, that the proceeds of the gasoline use tax, under the statutes, are not, *by virtue of any statute,* allocated to the construction or maintenance of the public highways of the State of New Mexico, and, *in the absence of any controlling statute,* properly become part of the general revenues of the state.

We have felt it necessary to call attention to this situation because of the insistence of counsel for the appellant that the allocation to highway purposes of these funds is one of the controlling factors in determining the type and character of the use tax and in construing the same, and particularly because of counsel's reference (Page 9 appellant's brief) to the case of *"Interstate Transit, Inc. v. Lindsey,* 283 U. S. 183.

It follows from the foregoing that the argument of the Attorney General based upon the allocation and use of the funds fails, unless the argument can be re-stated as follows:—

"Because the administrative officials of the State of

New Mexico have, as a matter of practice, allocated the use tax to highway purposes, and used it for such purposes, therefore, it follows that the use tax must be construed as a toll, charge or tax imposed upon appellant as compensation for use of the state highways." This goes beyond any rule announced by this Court or any other Court.

Even when we refer to the sales tax and the distribution of the same, it is payable not entirely for highway purposes but payable on bond and debenture obligations.

Sec. 2, Chapter 20, Session Laws of 1927, (Appendix "D")
Breece Lumber Co. vs. Mirabal, 34 N. M. 643, 287 P, 699 (affirmed 283 U. S. 788).

In addition to citing the case of *Interstate Transit, Inc. v. Lindsey,* supra, counsel for the appellants cited the cases of

Clark v. Poor, 274 U. S. 554
Hendrick v. Maryland, 235 U. S. 610
Interstate Busses Corp. v. Blodgett, 276 U. S. 245
Kane v. New Jersey, 242 U. S. 159

to the proposition that a "state may impose, even upon motor vehicles engaged exclusively in interstate commerce, a charge or compensation for the use of the public highways" (appellant's brief, p. 10).

The cases of *Hendrick v. Maryland,* supra, and *Kane v. New Jersey,* supra, involve the ordinary form of motor vehicle registration fees and licenses, the statutes in both cases specifically providing that such fees and licenses are exacted for the right or privilege to use the public highways.

The case of *Interstate Transit, Inc. v. Lindsey,* supra, involved a graduated privilege tax of the state of Ohio for the specific privilege of operating certain types of motor vehicles over the public highways.

Clark v. Poor, cited supra, involved the Ohio transportation act of 1923, which generally required motor common carriers for hire to apply to the Public Utilities Commis-

sion for a certificate so to do and to pay a specific tax for the privilege of so operating over the highways.

The case of *Interstate Busses v. Blodgett,* cited supra, involved a statute of Connecticut imposing a tax of one cent a mile "as an excise on the use of such highways."

It will be noted that in all of these cases it is specifically declared in the act in question that the exaction of the tax is either for the right to operate motor vehicles upon the public highways or as compensation for the use of the highways.

The earliest case appears to be the case of *Hendrick v. Maryland,* cited supra. Under our preliminary argument we have discussed and considered the cases cited by this Court in support of the rule announced in the case of *Hendrick v. Maryland,* and it will be seen that all cases so cited in *Hendrick v. Maryland* are what might be termed "toll" or "rent" cases.

Having cited the cases referred to supra, counsel for appellant then propounds the following query (p. 10 of appellants' brief):

> "Why may it (the state) not impose a similar charge upon gasoline used exclusively in interstate commerce?"

At page 14 of appellants' brief, counsel states:

> "We do not find a case in which this court has passed upon the validity of a gasoline tax as applying under conditions the same as those existing in the present case. However, we do find decisions of other courts upon state gasoline tax statutes which reflect views the same or similar to those we have expressed."

Counsel then cites the case of *Varney Air Lines v. Babcock,* 1 Fed. Sup. 687, and contends that the reasoning and principle invoked in that case is applicable to the case at bar.

Counsel for the appellee have made an exhaustive search to find any cases involving a gasoline use tax, supporting the tax as against one engaged in interstate commerce upon the "compensation" theory. The only cases

we have been able to find are *Boeing Air Transport v. Edleman,* 51 Fed. (2nd) 130, in which the judge of the district court expressed this theory, relying upon the Hendrick case, cited supra, and cases cited therein, none of which support, as we have heretofore shown, the contention that state compensation may be exacted from an interstate carrier *through an excise tax on the use of interstate facilities.* On appeal to the Circuit Court of Appeals, 61 Fed. (2nd) 319, the state compensation theory was entirely disregarded and, in effect, overruled, the Circuit Court of Appeals holding:

> "In so far as the Court denied the writ prayed for, the case will be remanded with directions to issue the writ enjoining collection of the tax on all gasoline procured by appellant on purchases completed outside the State of Wyoming and then brought into that State and used in its planes in interstate commerce." See *Boeing Air Transport v. Edleman,* 61 F. (2nd) 319, 324.

When the case reached this Court there was no occasion to refer to the "use of state facilities" argument as the whole issue was by the amended complaint confined to the application of the tax to gasoline "which respondent withdraws from storage" in the State. See *Boeing Air Transport v. Edleman,* 289 U. S. 249.

The only other case we are aware of in the Federal Courts on this point is *Varney Air Lines vs. Babcock* (D.C.) 1 F. Sup. 687. It follows the same line of reasoning and relies on the same authorities as the District Court did in the Boeing case, which was reversed by the Circuit Court.

Counsel for appellant also cites, as sustaining this theory, the case of *State v. Johnson* (La.) 138 South. 503. In that case the legislature passed an act levying a tax of four cents a gallon on all gasoline and motor fuel sold, used or consumed in the State of Louisiana for domestic consumption. The gasoline in controversy was imported by the common carrier and was stored in its tanks and was thereafter used. The Court held that the tax so imposed and collected on the gasoline taken from storage and used did not constitute an unconstitutional burden on interstate

commerce, and in arriving at its conclusion used the language quoted on page 15 of appellants' brief.

This brings us to a consideration of the case of *Helson v. Kentucky*, 279 U. S. 245. It is the contention of counsel for appellee that the rule announced in this case is the applicable rule in the case at bar. This case has been referred to and construed in the following cases:

Mid-Continent Air Express Corp. v. Lujan, 47 Fed. (2nd) 266
United Airways v. Shaw, 43 Fed. (2nd) 148, 150
Eastern Air Transport v. Tax Commission, 285 U. S. 147 at p. 153
Edleman v. Boeing Air Transport, 289 U. S. 249
Central Transfer Co. v. Commercial Oil Co., 45 Fed. (2nd) 400, at p. 402.
Western Air Transport v. South Carolina Tax Commission, 52 Fed (2nd) 456, at p. 459
American Airways v. Wallace, 57 Fed. (2nd) 877 at p. 881

As we read the foregoing cases and the distinctions made in these cases between the facts in the particular case and the Helson case, we find nothing which limits the ultimate and final holding in the Helson case, viz: (Quoting from the Helson case)

> "While a state has power to tax property having a situs within its limits, whether employed in interstate commerce or not, it cannot interfere with interstate commerce through the imposition of a tax which is, in effect, a tax for the privilege of transacting such commerce."

Helson v. Kentucky, cited supra.

This brings us to a consideration of the two New Mexico cases, *Breece Lumber Co. v. Mirabal*, 34 N. M. 643, 287 P. 699, and *Transcontinental & Western Air, Inc. v. Lujan*, 36 N. M. 64, 8 P. (2nd) 103.

As heretofore stated in this brief, the original gasoline

tax act in New Mexico, Chapter 93, Session Laws of 1919 (Appendix "A") was construed by this Court. This Court there held that the use tax feature of the act was an excise tax upon the privilege of using gasoline within the State of New Mexico. There being no difference between the two acts, we feel that this construction is controlling in the case at bar.

In the *Breece Lumber Co.* case, cited supra, the Supreme Court of New Mexico was called upon to construe the provisions of Section 1, Chapter 14 of the Session Laws of 1927 (Appendix "E") as amended by Section 1 of Chapter 29 of the Session Laws of 1929 (Appendix "F"). In that case the contention was made, on the one hand, that the tax was a property tax. Upon this question, the Court held that the tax was an excise tax, citing the case of *Bowman v. Continental Oil Co.*, supra, and other cases. The second contention made by counsel in that case was that it was a special privilege tax upon users of the public roads of the State. In considering this question, the Court said:

> "Much effort is made in the argument and brief of counsel for appellees to convince us that this is a special privilege tax upon users of the public roads of the state by means of automobiles in traveling upon such highways. If we understand the argument it is as follows: The tax is a tax upon the use of public highways by gasoline propelled vehicles; appellees do not use the public highways in the consumption of gasoline in their operations; therefore they cannot legally be charged with the tax. If both of appellees premises were true their conclusion would inevitably follow. The trouble is with the major premise. In the first place, as we have heretofore assumed, the tax is not laid on the use of public highways, and it is likewise true that the entire proceeds of the tax are devoted, by statute, to the payment of such bonds and debentures as may have been issued by the state to secure a fund with which to build and improve the highways of the state. But this has nothing to do with the matter. *This is merely a financial arrangement of the state to make sure provision for the prompt payment of its obliga-*

tions when they become due. The gasoline tax is known to be a large revenue producer, and the *state has simply set it aside to pay principal and interest on its obligations on which it has borrowed money.* The obligation to apply the gasoline tax does not in any way discharge the state from its obligation to pay its debts out of any available revenues. It seems clear, therefore, that this tax is a simple excise tax and is in no sense a special privilege or benefit tax, as appellees argue." (Underlining ours) *Breece Lumber Co. v. Mirabal,* 34 N. M. 643, 287 Pac. 699. (Affirmed 283 U. S. 788).

In the *Transcontinental and Western Air* case, cited supra, the Supreme Court of New Mexico said:

"It is one thing to tax appellee for using, as an instrumentality in interstate commerce, its own property, upon which perchance it has already paid lawful excises imposed by other states. It is quite a different thing, we think, to tax the business of selling gasoline, which by force of circumstances only, adds to the expense of appellee's interstate business."

"Since this suit was instituted the legislature has made provision for refunds to purchasers of gasoline for use otherwise than in motor vehicles operated on the highways. Laws 1931 C. 31. Appellee suggests that this may well be considered as a legislative construction of 1929 Comp. sec. 60-203, and as evincing legislative intent to exempt gasoline sold for aircraft use. The history of gasoline tax legislation in this state will not warrant such construction." See *Transcontinental & Western Air, Inc. v. Lujan,* 36 N. M. 64, 74, 8 Pac. (2nd) 103.

Counsel for appellee, under Point IV, takes the position that, notwithstanding the definite and specific determination of the character of the tax by the Supreme Court of New Mexico, such interpretation and construction of the act by the Supreme Court of New Mexico is not binding upon the Supreme Court of the United States. We will discuss this at a later point in the brief.

It is sufficient to state at this point that we take the position that the construction of the particular acts in question, both by this Court and by the Supreme Court of the State of New Mexico, *definitely establish the character of the tax as an excise tax upon the use of gasoline,* regardless of where or how it is used, and that in the face of these decisions, two by this Court, and two by the Supreme Court of New Mexico, it cannot now be said that the tax imposed by the several acts referred to herein can be construed or held to be a toll, charge or compensation exacted by the State of New Mexico for the use of the public highways. Even if we should admit, for the sake of argument, that the statute is now open to construction by this Court, we take it that this Court in so construing the act will be bound to construe it in the light of the constitutional provisions of the State of New Mexico, and in particular, in the light of Sections 16 and 18 of Article IV of the New Mexico State Constitution (quoted supra under the heading of "Material Statutory and Constitutional Provisions" at page 5 of this brief).

Section 16 of Article IV of the New Mexico Constitution provides:

> "The subject of every bill shall be clearly expressed it its title * * * * but if any such is embraced in any act which is not expressed in its title, only so much of the act as is not expressed shall be void."

We take it that the Supreme Court of New Mexico in the *Breece Lumber Company* case had this provision of the constitution in mind when the court said "It seems clear, therefore, that this tax is a simple excise tax and is in no sense a special privilege or benefit tax, as appellees argue." And again when they said "In the first place, as we have heretofore assumed, the tax is not laid on the use of the public highways." And again, when the Supreme Court of New Mexico, in the *Transcontinental and Western Air* case used the language quoted above. Section 16 of Article IV of the New Mexico Constitution has been construed by the New Mexico Supreme Court in the following cases:

State v. Ingalls, 18 N. M. 211, 135 Pac. 1177
State v. Saint, 28 N. M. 165, 219 Pac. 573
Davey v. McNeill, 31 N. M. 7, 240 Pac. 482
State v. Armstrong, 31 N. M. 220, 243 Pac. 333
State v. Miller, 33 N. M. 200, 263 Pac. 510
State ex rel Taylor v. Mirabal, 33 N. M. 540, 273 Pac. 928

In the case of *State v. Ingalls,* cited supra, the court lays down the rule as follows:

> "The true test of the validity of the statute, alleged to contain two subjects, one of which is not clearly expressed in the title, in conformity with Section 16 of Article IV of the Constitution, is whether the title fairly gives reasonable notice of the subject matter of the statute itself."

In the case of *State v. Saint,* cited supra, the title of the act in question was "An Act creating the County of Harding and providing for the issuance, sale, transfer and assignment of establishment bonds in aid thereof." Under this title Section 19 of the act attempted to provide for the establishment of a county high school and to levy taxes for the support of the same and to provide for the issuance of debentures in anticipation of tax collections. The Court held that Section 19 was school legislation and not within the title to the act creating Harding County.

An examination of the several taxing statutes cited in the Appendix, from Appendix A to and including Appendix G, fails to disclose any intent on the part of the legislature to levy the use tax or the sales tax as a toll, charge or compensation for the use of the public highways. On the other hand, when we refer to the provisions of Chapter 129 of the Session Laws of 1929, and Chapter 154 of the Session Laws of 1933, Appendix I and Appendix J, which are the acts providing for the supervision and regulation of the business of transporting persons and merchandise over the public highways for hire, we find a specific provision in the title, in each instance, to the effect that the taxes and fees provided in such acts are for compensation to be paid

for the use of the public highways of the State of New Mexico, and in the second act for the carrying on of business upon the public highways. It will be noted that these acts were in force at all times material to the issues involved in the case at bar. We recognize the well known principle of law, which has been announced many times by this Court, that a state is not limited to any one particular form of taxation; that it may impose two different taxes for the exercise of a particular right or privilege, but in the instant case we have two statutes specifically providing that the taxes and fees are exacted as compensation for the use of the public highways, while the statutes here in question do not in any manner or form indicate that the tax upon the use of gasoline is assessed under the compensation theory.

Under Point I counsel for appellants present the contention that when the use tax acts are considered in conjunction with Chapter 31 of the 1931 Sessions Laws of New Mexico (Appendix H) and the amendments thereto, the gasoline use tax acts constitute merely a compensatory and regulatory exaction for the use of the public highways of the State of New Mexico. We will discuss this feature under the next heading in this brief.

APPELLEE'S ARGUMENT IN RESPONSE TO APPELLANTS' POINT II

Under Point II counsel for appellants advance the proposition that the Supreme Court of New Mexico has not construed the use tax acts in conjunction with Chapter 31 of the Session Laws of 1931 (Appendix H). Therefore the determination of the character of the act is still an open question for this Court.

Before entering into a discussion of this question we desire to call the Court's attention to the language of Chapter 31 of the Session Laws of 1931.

First, the title to the act, so far as is material here, is "An Act to provide for refunding the excise taxes paid on gasoline or motor fuel purchased and used by consumers other than in motor vehicles operated or intended to be operated on any public streets or highways of the State of New Mexico." It will be noted that the title permits

the refund of excise taxes only on motor fuel purchased and used by the consumer. Under Section 1 of the act the refund can be obtained only where the purchaser has paid the excise tax to a *distributor or wholesaler* upon fifty-six gallons or more of gasoline or motor fuel. Under Section 2 of the act purchasers desiring to take advantage of the refund provisions must, at the time of purchase and payment of the tax, obtain a receipt. Under Section 3 of the act, after payment of the tax, and upon submitting the receipts to the State Comptroller and making an affidavit, the purchaser may obtain a refund. Under Sections 5 and 6 of the act the wholesale dealers and distributors are required to keep certain records, and a penalty is imposed for violation of the provisions of the act. Under Sections 7 and 8 of the act the penalties under the act are dealt with.

The 1933 amendments do not change the general purport of the 1931 act.

It appears from an examination of the act that the refunds provided *can only be obtained under the sales tax provisions of the gasoline tax act.* In other words, no refund can be had except in cases where the purchaser buys his gasoline from a *licensed wholesaler or distributor within the State of New Mexico.* A user of gasoline buying his gasoline from outside the state and using it within the state, regardless of the use to which the gasoline is put, cannot obtain a refund of the use tax paid on the gasoline so purchased outside of the State of New Mexico, notwithstanding the fact that he uses such gasoline other than in motor vehicles upon the public highways. We have called attention to this situation for the purpose of showing that the refund act of 1931 is, in effect and in fact, applicable only under the sales tax provisions of the gasoline tax act, and does not apply to the use tax provisions of the act. This brings us to a consideration of the effect of the refund act upon the gasoline tax acts in question in this suit.

In the first place, Chapter 31 of the Session Laws of 1931, and its amendatory act, are not exemption statutes. They are limited refund acts applicable only to the sales tax feature of the gasoline tax acts.

Can it then be said that this refunding act changes the type and character of the original gasoline excise tax acts?

Section 18 of Article IV of the New Mexico Constitution provides:

> "No law shall be revised or amended, or the provisions therof extended by reference to its title only, but each section thereof as revised, amended or extended shall be set out in full.

This provision of our constitution has been construed in the following cases:

Davey v. McNeill, 31 N. M. 7, 240 Pac. 482
State v. Armstrong, 31 N. M. 220, 243 Pac. 333

In the case of *State v. Armstrong,* supra, the Supreme Court of New Mexico was considering "An Act to enforce the provisions of Article 18 of the amendments to the Constitution of the United States prohibiting all acts or omissions prohibited by the national prohibition acts, etc." On re-hearing the Court held that the provisions of Sections 1 and 2 of the act, attempting to adopt by reference the penal provisions of the national prohibition act as the law of New Mexico, violated Section 18 of Article IV of the New Mexico Constitution, in that these sections attempted to extend the provisions of that act by reference to its title only and make them a part of the body of the law in New Mexico without setting the same out in full.

In the face of this decision of the New Mexico Supreme Court we fail to see how Chapter 31 of the Session Laws of 1931, the refunding act, can be construed to revise, amend or extend the provisions of the gasoline tax acts in question in this suit.

At page 17 of appellants' brief the Attorney General quotes from the case of *Transcontinental and Western Air, Inc. v. Lujan,* cited supra. Standing alone this quotation is, as we construe it, hardly a fair statement, and we quote the paragraph as follows:

> "The use tax comes to this: For the privilege of traversing New Mexico in the air, of landing on our soil, and of transporting mail and passengers into and

out of our state, we exact a price measured by the quantity of gasoline consumed. This seems to transgress the rule formulated in *Atlantic & Pacific Telegraph Co. v. Philadelphia,* 190 U. S. 160, 23 S. Ct. 817, 818, 47 L. Ed. 995: 'No state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce.' See, also, *Crutcher v. Kentucky,* 141 U. S. 47, 11 S. Ct. 851, 35 L. Ed. 649. *Barrett v. New York,* 232 U. S. 14, 34 S. Ct. 203, 58 L. Ed. 483. So considering the effect of the Kentucky tax, the Supreme Court condemned it saying: 'The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce.' *Helson v. Kentucky,* supra."

Quoting further from the same case on re-hearing:

"We are strongly impressed that the use tax is distinguishable from the sales tax, not only in form, but in operation and effect. The obvious purpose of the use tax in this state is to supplement the sales tax, rendering it impossible legally to avoid the latter by purchasing out of the state for use in the state. Users of gasoline are required to report and pay the tax only on such gasoline as was not purchased from a licensed dealer. 1929 Comp. Par. 60-102. It is one thing to tax appellee for using, as an instrumentality of interstate commerce, its own property, upon which perchance it has already paid lawful excises imposed by other states. It is quite a different thing, we think, to tax the business of selling gasoline, which, by force of circumstances only, adds to the expense of appellee's interstate business."

Following the quotation, at page 17, the Attorney General suggests that the learned Justice who wrote the opinion in the *Transcontinental and Western Air* case might have paraphrased the language, if he had been writing the opinion in the case at bar, as follows:

"For the privilege of traversing New Mexico over

the public highways and of using the highways of this state, owned and maintained at great expense by the state and specially built to withstand the tremendous wear and tear caused by large and heavy motor busses used in interstate commerce, we exact a price measured by the quantity of gasoline consumed."

The fallacy of the argument is that nowhere in the gasoline tax acts is there any intimation or suggestion, either in the title to the act or in the body of the act, that such was the legislative intent.

At page 18 of appellants' brief, the Attorney General quotes from the case of *Clyde Mallory Lines v. Alabama*, decided by this Court on December 9, 1935. The Attorney General apparently argues that the words italicized "levy of a tax," indicate that any kind of a tax can be levied upon interstate commerce, ignoring the qualification "which represents a reasonable charge upon interstate automobile traffic passing over state highways." The cases cited by this Court to the quoted language have been heretofore discussed in our brief.

APPELLEE'S REPLY TO APPELLANTS' POINT III.

Under Point III the Attorney General takes the position that even if Chapter 176 is construed to be an excise tax upon the use of gasoline, it can still be justified as a compensatory or regulatory exaction for the use of state facilities.

The Attorney General attempts to distinguish the Helson case, and submits that the rule announced in that case is not applicable and should be qualified by this Court because in the Helson case there was no state facility involved while in the case at bar the appellee uses the New Mexico state highways, citing the two cases of *Hendrick v. Maryland* and *Interstate Transit v. Lindsey*, italicizing certain expressions contained in those two cases. We have heretofore discussed both of these cases and do not think it necessary to burden this brief with further discussion.

APPELLEE'S REPLY TO APPELLANTS' POINT IV

Under this point the Attorney General contends that the characterization of Chapter 176, laws of 1933, by the Supreme Court of New Mexico is not binding upon the Supreme Court of the United States, making the contention that the question involved in the case at bar is one of deprivation of rights secured by the Federal Constitution. The majority of the three-judge Court held that the New Mexico statute means what the New Mexico Supreme Court says it means. In other words, a tax upon the use of gasoline, and not a toll, rent or charge exacted as compensation for the use of the highways.

In support of his contention the Attorney General cites *American Manufacturing Co. v. St. Louis*, 250 U. S. 459, together with a list of cases following the holding in this case.

It is our contention that the Attorney General has failed to distinguish the two lines of cases. Without entering into a lengthy discussion, we take the position that the character of the tax, viz: as to whether it is an excise tax upon the use of gasoline, or, on the other hand, a toll, rent or charge exacted as compensation for use of state facilities, is a matter for the state to determine, and that not only has the state answered the question in the *Breece Lumber Co.* case and the *Transcontinental and Western Air, Inc.* case, but in addition to that, this Court has definitely construed the act in the two cases of *Askren v. Continental Oil Co.* and *Bowman v. Continental Oil Co.*, cited supra. In support of our contention, we cite the late case of *United States v. Kombst*, 286 U. S. 424. In that case the question was whether the California tax was a succession or an estate tax. The California courts, in several cases, having construed the California inheritance tax as laying a succession tax and not an estate tax, this Court held it was bound by the construction placed upon the act by the State Court. In the case at bar we contend that the character of the tax has been definitely determined, and that this Court is not now "free to construe this statute a priori" to the extent of determining the character of the tax. The character of the tax having been determined, the effect the tax

may have upon interstate commerce, and whether the tax deprives the party of rights secured by the Federal Constitution, is, of course, a matter to be determined in the Federal Court from the practical operation and effect of the act.

See also the case of "*Frost vs. Railroad Commission*" (California) 271 U. S. 583. In this case the California Supreme Court construed the California truck transportation act as permitting a private carrier to use the highways only on condition that he dedicate his property to the business of public transportation and subject himself to duties and burdens imposed on common carriers. This Court held that the construction the California Supreme Court placed upon the act was binding upon this Court, and that the act, as so construed, violated the due process clause under the Fourteenth Amendment.

The distinction in the various cases appears to be:— If the State Supreme Court construes the state statute as not depriving one of constitutional rights under the United States Constitution and the United States Supreme Court finds that, regardless of such construction, constitutional rights are abused, the decision of the State Supreme Court does not bind the United States Supreme Court. If, however, a State Supreme Court construes the statute so that, if it is applied in accordance with such construction, federal constitutional rights are abused, then the decision of the State Supreme Court is binding on the United States Supreme Court for final determination of whether or not, under such construction, federal constitutional rights have been invaded. We think this is the distinction.

See also *Crew Levick Co. v. Penn,* 245 U. S. 292.

At the legislative session in 1933, the New Mexico legislature completely codified and revised the gasoline and motor fuels excise tax laws. (Chapter 176, Session Laws of 1933—Appendix "G"). This codification and revision was made three years after the handing down by the Supreme Court of the State of New Mexico of the opinion in the case of "*Breece Lumber Co. vs. Mirabal,*" cited supra, which was handed down March 31, 1930. Under the familiar rule of construction, which does not need citation of authority, the legislature is presumed to know the construction placed

upon the legislation which it amends, codifies and revises. At the time it re-enacted, codified and revised the gas tax statute, the legislature was informed, through the Breece Lumber Co. case, that the original acts had been interpreted and applied by the Court as a mere excise tax, and that the Court had specifically declared that the tax levied was not levied as a rent, toll or compensation for the use of the state highways. The legislature, knowing this fact, still chose to leave the statute as it was, and in its re-enactment, revision and codification, did nothing to evidence any desire on the part of the legislature to make the statute one for compensation or otherwise different from the statute it was repealing, revising and amending, and which had been definitely construed by the Supreme Court of the State of New Mexico as being a pure excise tax, and not a rent, toll, or compensation for the use of the state highways.

In this same connection, in the case of *"Transcontinental and Western Air, Inc., v. Lujan,"* 36 N. M. 64, 8 P. (2nd) 103, the Supreme Court of New Mexico had specifically called to its attention the provisions of the original refund act, Chapter 31 of the Session Laws of 1931 (Appendix "H") and, while the Attorney General calls attention to the fact that the observations made by the Supreme Court of New Mexico upon the refund act are probably *dicta,* this case was also decided prior to the revision of the gas tax act (Chapter 176, Session Laws of 1933—Appendix "G"), and again the legislature is presumed to have been fully informed as to the interpretation of the gasoline tax acts and the refund act of 1931.

Notwithstanding this situation, the legislature did nothing to indicate that the gasoline tax act, as revised, amended, and codified in Chapter 176 of the Session Laws of 1933, was to be considered as a toll, rental, or compensation for the use of the state highways.

We, therefore, confidently submit that in the light of all of these facts, this Court cannot do otherwise than follow the construction placed upon the act by the Supreme Court of the State of New Mexico.

POINT V.

THE STATE OF NEW MEXICO IS WITHOUT POWER TO REQUIRE THE APPELLEE CORPORATION, ENGAGED EXCLUSIVELY IN INTERSTATE COMMERCE, TO BECOME A DISTRIBUTOR UNDER THE PROVISIONS OF CHAPTER 176 OF THE SESSION LAWS OF 1933 (Appendix "G").

As we have heretofore stated, this question was squarely presented to the three-judge Court under the pleadings and issues framed in this cause, but was not passed upon by the three-judge Court in its opinion, undoubtedly upon the theory that it was not necessary to a determination of the question in view of the holding of a majority of the Court upon the character and effect of the gasoline taxing provisions of Chapter 176 of the Session Laws of 1933.

It will be noted, at page 15 of the Transcript of Record, that the Gasoline Tax Department demanded that the appellee take out a license as a distributor of motor fuel under the provisions of the act and make reports as provided under the act. Turning to the act itself (Appendix "G") we find that in order to become a distributor it is necessary for the appellee, a foreign corporation, to be domesticated within the State of New Mexico, notwithstanding it does no intrastate business within the State of New Mexico. This requirement is clearly beyond the powers of the state.

Crutcher v. Kentucky, 141 U. S. 47, 51-63.
Western Union Tel. Co. v. Kansas, 216 U. S. 1, 27.
International Text Book Co. v. Pigg, 217 U. S. 91, 108-114
Sioux Remedy Co. v. Cope, 235 U. S. 197, 203-204
Bowman v. Continental Oil Co. 256 U. S. 642, 643-650

Under our propositions of law stated supra, we have called attention to the requirements of Chapter 176, Session Laws of 1933 (Appendix "G"), which the act imposes upon a licensed distributor. Without unduly lengthening this brief, in order to become a licensed distributor, the appellee would be required to qualify as a foreign corpora-

tion under the laws of the State of New Mexico, with all the incidental burdens and obligations of such qualification. In addition to that, the appellee would be required to make application for a distributor's license, pay the fee therefor submit reports, keep books and records as required by the act, submit its records to examination and inspection, and generally to be subject to the penalties of the act, notwithstanding the fact that the appellee does no intrastate business.

POINT VI.

SUMMARY OF APPELLEE'S POINTS

We may summarize the contentions of the appellee as follows:—

First:—The New Mexico gasoline tax is not the same kind of a tax as was held constitutional in the toll, rental, telephone pole, canal lock, and similar cases.

Second:—The tax is an excise tax levied on an instrumentality of interstate commerce (*Helson v. Kentucky,* cited supra).

Third:—That whether or not the tax is levied for compensation, the same is invalid as against the appellee engaged solely in interstate commerce.

Fourth:—That the tax is not for compensation as construed by the Supreme Court of the State of New Mexico, and the construction placed upon the gasoline tax act by the Supreme Court of the State of New Mexico is binding upon this Court.

Fifth:—That neither the State Court nor this Count (if this Court can construe the act) could construe the New Mexico gasoline tax acts, and particularly the use tax, as a rental, toll, or compensation for the use of the state highways, in the light of the legislative history of the acts, the New Mexico constitutional provisions requiring the purpose and intent of an act to be clearly set out in its title, or because of the purposes to which the proceeds of the use tax are devoted.

Sixth:—The attempted requirement under the provisions of Chapter 176 of the Session Laws of 1933 that the

appellee qualify under the corporation laws of New Mexico and become a distributor, is unconstitutional and void as imposing a burden on interstate commerce.

CONCLUSION

We, therefore, submit that the decree of the three-judge Court, enjoining appellants from enforcing the statutes in question as against the operations of the appellee, is right as a matter of law, and that the case should be affirmed.

Respectfully submitted,

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APPENDIX "A"

Chapter 93, Session Laws of 1919

AN ACT PROVIDING FOR AN EXCISE TAX UPON THE SALE OR USE OF GASOLINE AND FOR A LICENSE TAX TO BE PAID BY DISTRIBUTORS AND RETAIL DEALERS THEREIN; PROVIDING FOR COLLECTION AND APPLICATION OF SUCH TAXES; PROVIDING FOR THE INSPECTION OF GASOLINE AND MAKING IT UNLAWFUL TO SELL GASOLINE BELOW A CERTAIN GRADE WITHOUT NOTIFYING PURCHASER THEREOF; PROVIDING PENALTIES FOR VIOLATIONS OF THIS ACT AND FOR OTHER PURPOSES.

(This act was in effect from March 17, 1919 until repealed by Chapter 175, New Mexico Session Laws of 1921.)

* * * * *

Sec. 2. LICENSE TAXES. Every distributor of gasoline shall pay an annual license tax of fifty dollars for each distributing station or place of business or agency.

* * * * *

It shall be unlawful for any person to distribute or sell gasoline after July 1st, 1919, without having paid the said license tax and without having at all times conspicuously displayed at his place of business or agency a license certificate evidencing the payment of such license tax for the then current year or fraction thereof.

Sec. 3. There is hereby imposed an excise tax upon the sale or use of all gasoline sold or used in this State after July 1st, 1919, which tax shall be paid as hereinafter provided at the rate of two cents per gallon upon all gasoline sold or used.

* * * * *

Sec. 5. It shall be unlawful for any person (except tourists or travelers to the extent hereinafter provided) to use any gasoline not purchased from a licensed distributor of gasoline or retail dealer in gasoline in this State without paying the tax at the rate of two cents per gallon upon the use thereof.

* * * * *

It shall be unlawful for any person to knowingly use any gasoline without the said excise tax upon the sale or use thereof having been paid or provided for according to this Act; Provided, that any tourist or traveler coming into the state in a motor vehicle may bring into the State in such vehicle and for his own use only not more than twenty gallons of gasoline at one time and use the same with out payment of tax thereon.

Sec. 9. The State Treasurer shall set aside from the license fees and the taxes collected under the provisions of this Act a sufficient sum each year to pay the salaries and traveling expenses of the inspectors as herein provided, which salaries and expenses shall be paid in the manner provided by law for payment of salaries and expenses of other State officers and employes; the balance of the moneys so received from such collections shall be placed to the credit of the State Road Fund to be used for construction, improvement and maintenance of public highways.

APPENDIX "B"

Chapter 175, Session Laws of 1921.

AN ACT TO RETROACTIVELY AND PROSPECTIVELY LEVY AN EXCISE TAX ON GASOLINE; PROVIDE FOR THE DISTRIBUTION OF THE PROCEEDS THEREOF AND TO REPEAL CERTAIN LAWS.

(This act was in force from April 12, 1921 until amended by Chapter 61 of the Session Laws of 1925, March 17, 1925.

Sec. 3. There is hereby levied and imposed an excise tax of two cents per gallon upon the sale of all gasoline sold in this State from March 17, 1919, to and including the date of the taking effect of this act and an excise tax of one cent per gallon upon the sale of gasoline sold in this state thereafter, excepting in both cases, however, such gasoline as is or has been brought into this state and sold in original pack-

ages as purely interstate commerce sales or purchased outside the State and brought into this State in original packages by the consumer for his own use.

Sec. 5 * * * * *

The proceeds of such tax shall be paid into the State Treasury and covered into the State Road Fund, with the exception of fifteen thousand dollars thereof, which shall be covered into the State Fish Hatchery Fund out of collections made during the eleventh fiscal year and said fifteen thousand dollars shall be available during said fiscal year for the construction of State Fish Hatcheries under the direction and control of the State Game Commission, the moneys so covered into the State Fish Hatchery Fund shall be disbursed by warrant drawn by the State Auditor supported by certified and itemized vouchers of the State Game Commission.

APPENDIX "C"

Chapter 61, Session Laws of 1925.

AN ACT TO AMEND SECTIONS 3 and 5, CHAPTER 175, LAWS OF 1921, LEVYING AN EXCISE TAX ON GASOLINE AND PROVIDING FOR THE DISTRIBUTION OF THE PROCEEDS THEREOF.

(This act remained in effect until amended by Chapter 20, New Mexico Session Laws of 1927, approved March 4, 1927.)

Sec. 1. That Section 3, Chapter 175, Laws of 1921, be and the same is hereby amended to read as follows:

"Sec. 3. There is hereby levied and imposed an excise tax of three cents per gallon upon the sale of all gasoline sold in this State, excepting in all cases, however, such gasoline as is or has been brought into this State and sold in original packages as purely interstate commerce sales, or purchased outside the State and

brought into this State in original packages by the consumer for his own use."

Sec. 2. That Section 5, Chapter 175, Laws of 1921, be and the same is hereby amended to read as follows:—

"Sec. 5. * * * * * The proceeds of such tax shall be paid into the State Treasury and covered into the state road fund, the same to be budgeted and used by the State Highway Commission for the maintenance of state highways."

APPENDIX "D"

Chapter 20, Session Laws of 1927.

AN ACT TO AMEND SECTIONS 3 AND 5 OF CHAPTER 175, LAWS OF 1925, PROVIDING FOR AN EXCISE TAX ON GASOLINE AND THE USE OF PROCEEDS THEREOF FOR MAINTENANCE, CONSTRUCTION AND IMPROVEMENT OF PUBLIC HIGHWAYS AND TO MEET THE PROVISIONS OF THE FEDERAL AID ROAD LAW, AND AUTHORIZING THE ISSUE AND SALE OF DEBENTURES.

(Approved March 4, 1927.)

Sec. 1. That Section 3 of Chapter 175, Laws of 1921, as amended by Chapter 61, Laws of 1925, be and the same is hereby amended to read as follows:

"Sec. 3. There is hereby levied and imposed an excise tax of five cents per gallon upon the sale of all gasoline sold in this state, except gasoline sold in original packages or containers as purely inter-state commerce sales."

(This section was compiled as Section 60-203, New Mexico Statutes Annotated, Compilation of 1929, and is one of the effective statutes in this case.)

Sec. 2. That Section 5 of Chapter 175, Laws of 1921, as amended by Chapter 61, Laws of 1925, be and the same is hereby amended to read as follows:—

"Sec. 5. * * * * *

"The proceeds of said tax, except such portion thereof as may be necessary to pay the principal and interest of debentures issued hereunder, shall be paid into the state treasury and covered into the State Road Fund to be used for maintenance, construction and improvement of state highways and to meet the provisions of the Federal Aid Road Law."

(Section 2 of the Act was compiled as Section 60-205, New Mexico Statutes Annotated, Codification of 1929.)

APPENDIX "E"

Chapter 14, Session Laws of 1927.

AN ACT PROVIDING FOR AN EXCISE TAX UPON THE USE OF GASOLINE AND MOTOR FUEL.

(This Act was approved March 4, 1927, and remained in effect until amended by Chapter 29 of the Session Laws of 1929, approved March 7, 1929.)

Section 1. There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this State for propelling or operating motor busses, commercial cars, trucks, or other vehicles, upon public highways in New Mexico; provided, that in the collection of such tax a deduction shall be allowed of the excise tax paid in this State by distributors and dealers upon the sale of the gasoline and motor fuel so used.

APPENDIX "F"

Chapter 29 of the Session Laws of 1929.

AN ACT TO AMEND SECTION 1 OF CHAPTER 14, LAWS OF 1927, PROVIDING FOR AN EXCISE TAX UPON THE USE OF GASOLINE.

(This Act was approved March 7, 1929, being compiled in the New Mexico Statutes Annotated, Codification of 1929, as Section 60-101, and is one of the effective sections in this case.)

Section 1. That Section 1 of Chapter 14 of the Laws of 1927 be and the same is hereby amended to read as follows:

"Section 1. There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in state *for any purpose;* provided that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this state by distributors or dealers upon the sale of gasoline so used."

APPENDIX "G"

Chapter 176, Session Laws of 1933.

AN ACT TO CODIFY AND REVISE THE GASOLINE AND MOTOR FUELS EXCISE TAX LAWS; TO DEFINE GASOLINE AND MOTOR FUELS AND OTHER TERMS; TO LEVY AN EXCISE TAX OF FIVE CENTS (5c) PER GALLON; TO PROVIDE FOR THE LICENSING OF ALL DISTRIBUTORS AND RETAIL DEALERS AND BONDING OF DISTRIBUTORS; TO PROVIDE FOR REPORTS FROM DISTRIBUTORS, RETAIL DEALERS, CARRIERS, AND OTHERS; TO PROVIDE FOR DEDUCTIONS FOR SALE TO FEDERAL OFFICERS; TO GIVE THE STATE COMPTROLLER POWER TO CAN-

CEL LICENSES AND BONDS; TO ESTABLISH THE TAX AS A LIEN ON PROPERTY; TO PROVIDE FOR PENALTIES AND PROCEDURE FOR COLLECTION OF TAX; TO REQUIRE DISTRIBUTORS, RETAIL DEALERS AND OTHER PERSONS TO PRESERVE RECORDS; TO PROVIDE FOR EXCHANGE OF INFORMATION AMONG THE STATES AND UNITED STATES; TO GIVE THE STATE COMPTROLLER AUTHORITY TO TEST MOTOR VEHICLE FUEL AND TO APPOINT AGENTS AND OFFICERS; TO PROHIBIT DELIVERY OF MOTOR FUEL FROM TANK TRUCKS TO MOTOR FUEL TANKS; TO PROVIDE PROCEDURE FOR COLLECTION OF TAX UPON DISCONTINUANCE OR TRANSFER OF BUSINESS OF DISTRIBUTOR OR RETAIL DEALER; TO CONTINUE EXISTING LIABILITIES FOR TAXES, PENALTIES AND INTEREST; TO REPEAL THE FOLLOWING ARTICLES AND SECTIONS OF THE NEW MEXICO STATUTES ANNOTATED, 1929 COMPILATION: ALL OF ARTICLE 1, SECTION 60, OTHERWISE CITED AS SECTIONS 60-101, 60-102, 60-103, 60-104 and 60-105; ALSO SECTIONS 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 of ARTICLE 2, CHAPTER 60, OTHERWISE CITED AS SECTIONS 60-201, 60-202, 60-203, 60-204, 60-206, 60-207, 60-208, 60-209, 60-210, 60-211, 60-212 and 60-213; AND ANY LAWS IN CONFLICT THEREWITH.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Sec. 1. *Definitions.* • • • • •

(c) "Distributor" shall mean and include any person (including the State of New Mexico and any political subdivision thereof, but not including the United States of America or any of its agencies except to the extent now or hereafter permitted by the constitution and laws thereof)

(1) Making the first sale or other disposition in the State of New Mexico of any motor fuel, imported into the said State from any other state, territory or foreign country, after the same shall have been received within said state within the meaning of this Act;

(2) Consuming or using in the State of New Mexico any motor fuel so imported, who shall have purchased or otherwise acquired the same before it shall have been received by any other person in this state within the meaning of this Act;

(3) Producing, refining, preparing, distilling, manufacturing, blending or compounding motor fuel in the State of New Mexico;

(4) Engaged in the business of selling or delivering gasoline or motor fuel in this state from refineries, tank farms, tank cars, receiving tanks, bulk stations, or tank wagons in wholesale quantities, not coming within the definition of "distributor" as above given.

* * * * *

Sec. 2. *Five Cents (5c) Per Gallon Excise Tax.* There is hereby levied and imposed an excise tax of five cents (5c) per gallon upon the sale and use of all gasoline and motor fuel except gasoline sold in interstate commerce, *Provided*, that this tax shall be collected only once upon any particular motor fuel, and where the excise tax has been paid in this state by distributors or dealers upon the sale a like tax shall not be collected for the use of the same motor fuel; *Provided, however,* that nothing in this Act shall prohibit any incorporated municipality from assessing and collecting the tax provided for in Chapter 159 of the 1931 Session Laws.

Sec. 3. *Application for Licenses; Contents; Licensing of Distributors.* It shall be unlawful for any distributor to import, receive, use, sell or distribute any motor fuel or for any retail dealer to engage in business within this state as such, unless such distributor or retail dealer is the holder of an uncancelled license issued by the State Comptroller to engage in such business. To procure such license, every distributor or retail dealer shall file with the State

Comptroller an application upon oath, and in such form as said Comptroller may prescribe, setting forth:

(a) The name under which the distributor or dealer will transact business within this state;

(b) The location, with street number address, of its principal office or place of business within this state;

(c) The name and complete residence address of the owner, or the names and addresses of the partners, if such applicant is a partnership, or the names and addresses of the principal officers, if such application is a corporation or association; and if such applicant is a corporation or association, organized under the laws of another state, territory or county, it shall also file with such application a certified copy of the certificate of license issued by the New Mexico Corporation, Commission showing that such corporation or association is authorized to transact business in this state.

Upon the filing of an application for a license, and concurrently therewith, a bond or bonds of the character stipulated and in the amount provided for in Section 4 shall be filed with the State Comptroller. No license shall issue upon any application to any distributor unless accompanied by such a bond or bonds.

* * * * *

Upon the filing of the application for a license as distributor, a license fee of twenty-five dollars ($25.00) shall be paid to the Comptroller for each distribution station or place of business or agency; upon the filing of the application for a license as a retail dealer, a license fee of five dollars ($5.00) shall be paid to the Comptroller for each place of business or agency. Such license fee shall be payable annually on or before the first day of December for the following calendar year.

* * * * *

Sec. 4. *Bond required of Licensed Distributor.* Every distributor shall file with the State Comptroller a bond or bonds, on a form to be approved by said Comptroller, and

with a surety company authorized by the New Mexico Corporation Commission to transact business in this state as surety thereon and upon which such distributor shall be the principal obligor and the State of New Mexico shall be the obligee, conditioned upon the prompt filing of true reports and the payment by such distributor to said Comptroller of any and all motor vehicle fuel taxes which are now or hereafter may be levied or imposed by this state, together with any and all penalties and/or interest thereon and all fines which may be levied for any violations of this Act, and generally upon faithful compliance with the provisions of this Act.

* * * * *

Sec. 9. *Report from Persons Not Distributors; Penalty for Failure to Submit Report.* Every person purchasing or otherwise acquiring motor fuel otherwise than from a licensed distributor or retail dealer under the provisions of this Act, and using the same within the State of New Mexico, shall, on or before the twenty-fifth (25th) day of the month next succeeding the month in which such motor fuel was acquired or purchased, make a verified report to the State Comptroller, on forms prescribed and furnished by him, showing the amount of motor fuel so acquired or purchased, from whom such motor fuel was purchased or otherwise acquired, the point of shipment, to whom shipped, the point of delivery, the date of shipment, the name of the carrier over which the same was shipped, the initials and numbers of any railroad car containing such shipment and the number of gallons contained in said shipment, together with an affidavit showing the use to which such motor fuel is to be put or has been put, and such other additional information as the State Comptroller may require relative to such motor fuel.

Sec. 13. *Distribution of Tax and Licenses.* The excise tax of five cents (5c) per gallon on motor fuel and gasoline as herein levied and provided for shall be distributed as now or hereafter provided by law.

Sec. 23. *Failure to File Statement; False Statement; Doing Business Without License, etc.: Penalties.* Any per-

son who shall refuse or neglect to make any statement, report or return required by the provisions of this Act, or who shall knowingly make, or shall aid or assist any other person in making a false statement in a report to the State Comptroller, or who shall engage in business in this state as a distributor or retail dealer without being the holder of an uncancelled license to engage in such business, or who shall sell any motor vehicle fuel upon which the tax herein imposed shall not be paid, or shall violate any of the provisions of this Act, shall, upon conviction thereof, be punished by a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00) or imprisonment in the county jail for a term of not less than thirty (30) days, nor more than one (1) year, or both such fine and imprisonment. Each day or part thereof, during which any person shall engage in business as a distributor or retail dealer without being the holder of an uncancelled license, shall constitute a separate offense within the meaning of this section.

Sec. 26. *Repealing Clause.* (Repeals sections noted in title.)

APPENDIX "H"

Chapter 31 of the Session Laws of 1931.

AN ACT TO PROVIDE FOR REFUNDING THE EXCISE TAXES PAID ON GASOLINE OR MOTOR FUEL PURCHASED AND USED BY CONSUMER OTHER THAN IN MOTOR VEHICLES OPERATED OR INTENDED TO BE OPERATED ON ANY OF THE PUBLIC STREETS OR HIGHWAYS OF THE STATE OF NEW MEXICO; PROVIDING FOR THE KEEPING OF RECORDS IN CONNECTION THEREWITH, THE EXAMINATION THEREOF AND PENALTIES FOR THE VIOLATION OF ANY OF THE TERMS OF THIS ACT, AND FOR THE REVOCATION OF LICENSES FOR VIOLATIONS THEREOF: AND CREATING A SPECIAL SUSPENSE FUND TO CARRY OUT THE PROVISIONS OF THIS ACT.

(The foregoing Act was approved March 11, 1931, and remained in effect until amended by Chapter 162 of the Session Laws of 1933, March 15, 1933.)

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. That every person, firm, partnership, corporation or association having paid for any one purchase, the excise tax to a distributor or wholesaler upon fifty-six (56) or more gallons of gasoline or motor fuel, which gasoline or motor fuel was purchased and used solely and exclusively by such person, firm, partnership, corporation or association other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico, shall be entitled to a refund equal to the amount of tax so paid, upon compliance with the provisions of this act, and not otherwise.

Sec. 2. Every person, firm, partnership, corporation or association desiring to take advantage of the provisions of this act shall at the time of purchase and payment of tax, obtain a receipt for each and every purchase of gasoline or motor fuel from the wholesale dealer or distributor thereof, which receipt shall contain the name of the seller, his address, the name of the purchaser, his address, occupation, the quantity and grade of gasoline or motor fuel purchased, the amount of tax paid, the uses to which the purchaser intends to put such gasoline or motor fuel, the make, horsepower, and other mechanical description of machinery in which the same is to be used, and such other information as may be deemed necessary by the State Comptroller, and such receipt shall be signed in triplicate, two copies of which shall be carbon, by the seller and the purchaser or his or its duly authorized agent or agents. The forms of receipts shall be furnished by the State Comptroller, upon request, to wholesale dealers or distributors entitled thereto, and shall be printed in colors, the original to be retained by the seller or distributor as herein provided shall be green in color and the duplicate and triplicate may be of any other colors so as to make the same easily dis-

tinguishable. After the due execution of said receipts as herein provided, the seller shall return the duplicate to the purchaser and shall deliver the original green copy within thirty days to the State Comptroller.

Sec. 3. Upon the payment of the tax thereon, and at any time within four months after the date of the first purchase of any portion of the gasoline or motor fuel constituting any portion of the 200 gallons for which refund may be claimed under the provisions of this act, the purchaser may file an affidavit to be attached to the receipt returned to him, as provided in Section 2 of this act, which affidavit shall be sworn to under oath by the claimant before an officer authorized to administer oaths and shall state the quantity of such motor fuel so purchased and used by said claimant other than in motor vehicles operated or intended to be operated upon any of the public streets or highways of the State of New Mexico, with the State Comptroller requesting therein a refund of the tax paid; Provided, applications shall in no event be considered or allowed upon a total quantity of less than two hundred gallons of gasoline or motor fuel. For the purpose of carrying out the provisions of this act, the receipt, when attached to said affidavit, shall become a part thereof and shall be interpreted as such and have that effect. The said State Comptroller, upon presentation of said affidavits and receipts duly executed, shall cause to be refunded to said claimant consumer, from the gasoline or motor fuel taxes collected, an amount equal to the gasoline or motor fuel taxes paid by said claimant consumer on the gasoline or motor fuel so purchased and used. No application filed after the four months' period prescribed in this section shall be considered for any purpose by the State Comptroller or the Treasurer of the State of New Mexico.

Sec. 4. The State Comptroller, for the purpose of making the refunds provided in this act, is hereby authorized to create a special suspense fund with the Treasurer of the State of New Mexico, in sufficient amount to pay all legal claims made in conformity with the provisions of this act, from the funds derived from the excise tax on gasoline and

motor fuel as and when available. At the expiration of six months after the taking effect of this Act, the State Comptroller shall estimate the amount of funds necessary to make the refunds authorized herein, and shall keep an amount available at all times to meet the requirements of the provisions of this act. Any surplus fund over and above the estimated amount in such special suspense fund shall forthwith be turned into the highways funds of the State of New Mexico, to be distributed as provided by law.

Sec. 5. It shall be the duty of every wholesale dealer or distributor of gasoline or motor fuel in the State of New Mexico to keep a full and complete record of each and every receipt given to purchasers of gasoline or motor fuel, as authorized by the provisions of this act, and to deliver to the State Comptroller the green copy within thirty days, as in this act required. The State Comptroller, his deputy or any other person authorized by said Comptroller, shall make examinations of the records of sellers or distributors, as he may deem necessary in carrying out the provisions of this act. The costs of such examinations shall be borne by the state.

Sec. 6. Any wholesale dealer or distributor of gasoline or motor fuel in the State of New Mexico, failing or refusing to comply with the provisions of this act, shall be subject to revocation of his or its license to sell or distribute gasoline or motor fuel within the state and the State Comptroller is hereby given the power to enforce the provisions of this act.

Sec. 7. A person, firm, partnership, corporation, association or any officer or agent thereof, acting either as seller or purchaser, or in their behalf, who wilfully gives, signs or executes a false receipt or aids in the falsifying of a receipt, as provided for in this act, or who wilfully fails to keep a full and complete record as in this act provided, shall be guilty of a felony and shall be punished by a fine of not less than five hundred ($500.00) dollars nor more than one thousand ($1,000.00) dollars or by imprisonment

in the state penitentiary for not less than one nor more than two years, or by both such fine and imprisonment.

Sec. 8. Any person or any officer or agent of a corporation who wilfully files a false claim or aids in the filing of a false claim with the Comptroller of the State of New Mexico, or wilfully makes a false statement or conceals any material fact in any record, report, affidavit, receipt or claim provided for in this act, or knowingly uses any gasoline or motor fuel on which refunds have been applied for, in the operation of a motor vehicle on the public streets or highways of this state, shall be guilty of a felony and shall be dealt with and punished for such offense in the same manner as provided under Section 7.

APPENDIX "I"

Chapter 129 of the Session Laws of 1919.

AN ACT RELATING TO THE SUPERVISION AND REGULATION OF THE BUSINESS OF OPERATING MOTOR VEHICLES AS COMMON CARRIERS UPON THE PUBLIC HIGHWAYS AND PRESCRIBING THE COMPENSATION TO BE PAID FOR THE USE OF SUCH HIGHWAYS IN CARRYING ON SUCH BUSINESS.

(Approved March 12, 1929, and in effect until June 12, 1933, when amended and repealed by Chapter 154, Session Laws of 1933.)

Sec. 7. In addition to the regular license fees and taxes imposed upon motor vehicles, there shall be paid by and collected from every motor vehicle carrier except those specifically excluded from the provisions of this Act, the following charges as compensation for the use of the public highways and the maintenance, repair and reconstruction of the same:

(This section then prescribes the rates for different classes and kinds of service.)

Sec. 9. All monies collected by the Corporation Commission under the terms of this Act shall be remitted by said Commission to the State Treasurer of the State of New Mexico.

The said treasurer shall cover twelve and one-half per cent of such monies when received into a special fund to be known as the "State Corporation Commission Motor Vehicle Fund."

The monies in said State Corporation Commission Motor Vehicle Fund shall be used to defray the expenses of the performance by said Corporation Commission of the duties imposed on it under the provisions of this act, and shall be paid out for that purpose upon warrants executed by the State Auditor pursuant to vouchers drawn against said fund by said Corporation Commission; *Provided, however*, that any surplus remaining in said fund at the end of any fiscal year shall be transferred into and credited to the State Road Fund.

APPENDIX "J".

Chapter 154, Session Laws of 1933.

AN ACT RELATING TO THE SUPERVISION AND REGULATION OF THE BUSINESS OF THE TRANSPORTATION BY MOTOR VEHICLES FOR HIRE OVER THE PUBLIC HIGHWAYS OF THE STATE OF NEW MEXICO; PRESCRIBING THE COMPENSATION FOR THE USE OF SUCH HIGHWAYS AND CARRYING ON SUCH BUSINESS; AND REPEALING SUCH PARTS OF CHAPTER 129, LAWS OF NEW MEXICO OF 1929, CHAPTER 52, LAWS OF NEW MEXICO OF 1931, AND ALL OTHER LAWS OF THE STATE OF NEW MEXICO AS ARE IN CONFLICT HEREWITH.

(Approved March 15, 1933, effective June 12, 1933.)

Sec. 39. In addition to the regular license fees and taxes imposed upon motor vehicles, there shall be assessed against and collected from every such carrier for the ad-

ministration of this Act and for the maintenance, repair and reconstruction of the public highways a mileage tax which shall be computed as follows:—

(Remainder of this section prescribes the fees for different classes of service.)

Sec. 44. All monies collected by the Corporation Commission under the terms of this Act shall be remitted by said Commission to the State Treasurer of the State of New Mexico. The said Treasurer shall cover fifty per cent of such moneys when received into a special fund to be known as the "State Corporation Commission Motor Transportation Fund"; *Provided,* that the total expenditures by the Commission from this fund shall not exceed $25,000.00 per annum. And be it further provided that any and all expenditures from said fund shall first be approved by the State Board of Finance.

The money in said State Corporation Commission Motor Transportation Fund shall be used to defray the expenses of the performance by said Corporation Commission of the duties imposed on it under the provisions of this Act, and shall be paid out for that purpose upon warrants executed by the State Auditor pursuant to vouchers drawn against said fund by said Corporation Commission; *Provided, however,* that any surplus remaining in said fund at the end of any fiscal year shall be transferred into and credited to the State Road Fund.

SUPREME COURT OF THE UNITED STATES.

No. 520.—October Term, 1935.

John D. Bingaman, as Commissioner of Revenue of the State of New Mexico, et al., Appellants,
vs.
Golden Eagle Western Lines, Inc.

Appeal from the District Court of the United States for the District of New Mexico.

[March 30, 1936.]

Mr. Justice Sutherland delivered the opinion of the Court.

Appellee, a corporation organized under the laws of Delaware, is a common carrier operating a line of busses over the public highways of several states, including New Mexico, its business being limited to interstate transportation. It does no intrastate business in New Mexico, and expressly disclaims any intention of doing any such business in the future. The busses are propelled by gasoline, which, so far as this case is concerned, is purchased in another state, placed in tanks attached to the busses, and transported and used exclusively in interstate commerce.

A statute of the state (Chapter 176, § 2, Session Laws of 1933) imposes "an excise tax of five cents (5¢) per gallon upon the sale and use of all gasoline and motor fuel". Section 3 of the act prohibits any "distributor" from importing, receiving, using, selling or distributing any motor fuel, unless such distributor is the holder of an uncancelled annual license issued by the state Comptroller. For the license a fee is exacted of $25 for each distribution station or place of business or agency. A "distributor", as defined by § 1 of the act, includes a corporation consuming and using in the state any motor fuel purchased in and brought from another state. For failure to comply with the statute penalties are incurred. The effect of the statute is to compel a common carrier engaged exclusively in interstate transportation to procure a license as a "distributor" and pay an excise tax upon the use of motor fuel purchased in, and brought from, another state and used only in such transportation.

By an act, passed in 1931, Laws 1931, c. 31, provision is made for refunding taxes collected upon the purchase of gasoline in certain specified quantities and used for other purposes than the operation of motor vehicles upon the streets and highways of the state.

This suit was brought against appellants, state officers, to enjoin the threatened enforcement of the foregoing statutory provisions, together with the penal provisions connected therewith, on the ground, among others, that they constitute a regulation of interstate commerce in contravention of the commerce clause of the federal Constitution. The case was heard by the lower court, consisting of three judges as the federal law requires, and a decree entered in accordance with the prayer of the bill. —F. Supp. —.

The case turns upon the question whether the pertinent statutory provisions exact a charge as compensation to the state for the use of its highways, or impose an excise tax for the use of an instrumentality of interstate commerce. If the former, the tax should be sustained; if the latter, it clearly contravenes the commerce clause and must be held bad. *Helson and Randolph* v. *Kentucky*, 279 U. S. 245, and cases cited. The state supreme court has construed the provisions in *Geo. E. Breece Lbr. Co.* v. *Mirabal*, 34 N. Mex. 643, and *Transcontinental & Western Air, Inc.* v. *Lujan*, 36 N. Mex. 64; and the court below, rightly concluding that it was bound by this construction,* thought that it settled the matter against the validity of the tax. With this view we agree.

The New Mexico decisions dealt with an earlier act, the terms of which, however, without material change, were carried forward into the act of 1933, with the result that the new act became a continuation of the earlier one. *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 11-14. Compare *Posadas* v. *National City Bank of New York*, — U. S. —, January 6, 1936. In the *Breece* case the state court held that the exaction was a general excise tax upon the use of all gasoline in the state, and that it was not imposed for the use of the state roads. The court considered the suggestion that the entire proceeds of the tax were devoted by law to the building and improvement of the state highways, but said that this would not alter the fact that the tax was not exacted for the privilege of using

* United States *v.* Kombst, 286 U. S. 424, 426; Frost Trucking Co. *v.* R. R. Com. of California, 271 U. S. 583, 591-592.

these highways. The *Lujan* case reached the same conclusion. The state court drew a sharp distinction between the excise tax on the sale and that on the use of gasoline, holding the first to be valid and the second to be repugnant to the commerce clause of the federal Constitution as applied to an interstate air carrier. Both cases definitely refused to accept the view that the tax was a charge for the use of the highways.

Appellants contend that the refund provisions of the later 1931 statute, *supra,* nevertheless, demonstrate that the state legislature intended that the excise tax now in question should constitute compensation for the use of the highways. But the so-called refund provisions apply only in the case of taxes collected upon the *purchase* of gasoline, not of taxes collected for its *use.* Moreover, the state court in the *Lujan* case, p. 74, considered a like contention and rejected it as without substance.

As applied to appellee, an interstate carrier doing no intrastate business of any description, section 3 of the act, which exacts license fees from distributors, is plainly invalid as imposing a direct burden upon interstate commerce. *Crutcher* v. *Kentucky,* 141 U. S. 47, 58-59; *International Textbook Co.* v. *Pigg,* 217 U. S. 91, 108-113.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.